

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., .
et al., . USX Tower - 54th Floor
. 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. September 15, 2009
. 9:05 a.m.

TRANSCRIPT OF PLAN CONFIRMATION HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors: Kirkland & Ellis, LLP
By: DAVID BERNICK, ESQ.
LISA G. ESAYIAN, ESQ.
200 East Randolph Drive
Chicago, IL 60601

For the Asbestos Caplin & Drysdale, Chartered
Creditors Committee: By: NATHAN FINCH, ESQ.
PETER V. LOCKWOOD, ESQ.
One Thomas Circle, NW
Washington, D.C. 20005

For the Future Orrick, Herrington & Sutcliffe, LLP
Claimants By: JONATHAN GUY, ESQ.
Representatives: Washington Harbour
3050 K Street, N.W.
Washington, D.C. 20007

Audio Operator: Cathy Younker

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268 Evergreen Avenue
Hamilton, New Jersey 08619
E-mail: jjcourt@optonline.net

(609)586-2311 Fax No. (609) 587-3599

APPEARANCES (CONT'D):

For the Libby Claimants: Lewis, Slovak & Kovacich, P.C.
By: TOM L. LEWIS, ESQ.
MARK KOVACICH, ESQ.
725 Third Avenue North
Great Falls, MT 59401

For Fireman's Fund
and Allianz Entities: Stevens & Lee
By: JOHN D. DEMMY, ESQ.
1105 North Market Street
Wilmington, DE 19801

For Arrowood: Wilson, Elser, Moskowitz, Edelman,
& Dicker, LLP
By: CARL J. PERNICONE, ESQ.
150 East 42nd Street
New York, NY 10017

O'Melveny & Myers, LLP
By: TANCRED SCHIAVONI, ESQ.
Times Square Tower
Seven Times Square
New York, NY 10036

For BNSF Railway: Pepper Hamilton, LLP
By: BOB PHILLIPS, ESQ.
3000 Two Logan Square
Philadelphia, PA 19103

For CNA: Goodwin Procter, LLP
By: MICHAEL GIANNOTTO, ESQ.
Exchange Place
Boston, MA 02109-2881

For Fireman's Fund: Stevens & Lee
By: MARNIE SIMON, ESQ.
600 College Road East, Suite 4400
Princeton, NJ 08540

For Maryland Casualty: Connelly Bove Lodge & Hutz, LLP
By: JEFFREY WISLER, ESQ.
The Nemours Building
1007 North Orange Street
Wilmington, DE 19899

APPEARANCES (CONT'D):

For Ford, Marrin,
Esposito, Witmeyer
& Gleser, LLP:

Ford, Marrin, Esposito, Witmeyer &
Gleser, LLP
By: ELIZABETH M. DeCRISTOFARO, ESQ.
Wall Street Plaza, 23rd Floor
New York, NY 10005-1875

For AXA Belgium:

Tucker Arensberg, P.C.
By: MICHAEL A. SHINER, ESQ.
1500 One PPG Place
Pittsburgh, PA 15222

Mendes & Mount
By: EILEEN McCABE, ESQ.
750 Seventh Avenue
New York, NY 10019

For Kaneb Pipe Line
Operating Partnership,
LP:

Gilbert & Renton, LLC
By: ROBERT GILBERT, ESQ.
344 North Main Street
Andover, MA 01810

For Garlock Sealing
Technologies:

Robinson, Bradshaw & Hinson, P.A.
By: GARLAND CASSADA, ESQ.
RICHARD WOLF, ESQ.
101 North Tryon Street
Suite 1900
Charlotte, NC 28246

Morris James, LLP
By: BRETT FALLON, ESQ.
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801

For Federal Insurance
Company:

Cozen O'Connor
By: JACOB C. COHN, ESQ.
1900 Market Street
Philadelphia, PA 19103

For National Union Fire
Insurance Co.:

Zeichner Ellman & Krause, LLP
By: MICHAEL DAVIS, ESQ.
575 Lexington Avenue
New York, NY 10022

For the Unsecured
Creditors' Committee:

Strook & Strook & Lavan
By: KENNETH PASQUALE, ESQ.
180 Maiden Lane
New York, NY 10038

APPEARANCES (CONT'D):

For Fireman's Fund Insurance Co.: Crowell & Moring LLP
By: LESLIE A. DAVIS, ESQ.
MARK PLEVIN, ESQ.
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

For OneBeacon Ins. Co., Geico, Seaton Ins. Co. & Republic Ins. Co: Drinker Biddle & Reath LLP
By: MICHAEL F. BROWN, ESQ.
JEFFREY M. BOERGER, ESQ.
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103

Drinker Biddle
By: WARREN PRATT, ESQ.
1100 N. Market Street
Wilmington, DE 19801-1254

For Longacre Master Fund: Pepper Hamilton
By: JAMES C. CARIGNAN, ESQ.
Hercules Plaza, Suite 5100
1313 Market Street
Wilmington, DE 19899

TELEPHONIC APPEARANCES:

For the Debtors: Kirkland & Ellis, LLP
By: JANET BAER, ESQ.
ELLI LEIBENSTEIN, ESQ.
200 East Randolph Drive
Chicago, IL 60601

For the Debtors: Kirkland & Ellis, LLP
By: THEODORE FREEDMAN, ESQ.
CHRISTOPHER GRECO, ESQ.
CLEMENT YEE, ESQ.
Citigroup Center, 153 East 53rd St.
New York, NY 10022

For the Debtors: Pachulski, Stang, Ziehl & Jones
By: JAMES O'NEILL, ESQ.
919 North Market Street, 17th Floor
Wilmington, DE 19899-8705

For Various Claimant Firms: Stutzman, Bromberg, Esserman & Plifka
By: DAVID J. PARSONS, ESQ.
2323 Bryan Street, Suite 2200
Dallas, TX 75201

TELEPHONIC APPEARANCES (CONT'D):

For Morgan Stanley Senior Funding, Inc.:	Katten Muchin Roseenman, LLP By: JEFF FRIEDMAN, ESQ. MERRITT PARDINI, ESQ. 575 Madison Avenue New York, NY 10022-2585
For Morgan Stanley Senior Funding, Inc.:	Edwards Angell Palmer Dodge, LLP By: ROBERT CRAIG MARTIN, ESQ. 919 N Market St. Wilmington, DE 19801-3023
For Serengeti:	Vinson & Elkins, LLP By: ARI BERMAN, ESQ. Trammell Crow Center 2001 Ross Avenue, Suite 3700 Dallas, TX 75201
For Scott Company:	Vorys, Sater, Seymour & Pease, LLP By: TIFFANY COBB, ESQ. 52 East Gay Street Columbus, OH 43216
For Official Committee of Asbestos Property Damage Claimants:	Dies & Hile, LLP By: MARTIN DIES, ESQ. 1601 Rio Grande, Suite 330 Austin, TX 78701 LECG By: ELIZABETH DEVINE, ESQ. 1725 Eye Street NW, Ste 800 Washington, DC, 20006
For the Property Damage Committee:	Bilzin Sumberg Baena Price & Axelrod LLP By: MATTHEW KRAMER, ESQ. 200 South Biscayne Boulevard Suite 2500 Miami, FL 33131
For the Property Damage Committee:	Bilzin Sumberg Baena Price & Axelrod LLP By: SCOTT BAENA, ESQ. JAY SAKALO, ESQ. 200 South Biscayne Boulevard Suite 2500 Miami, FL 33131

TELEPHONIC APPEARANCES (CONT'D):

For the Bank Lenders:	Paul Weiss Rifkind Wharton & Garrison, LLP By: MARGARET PHILLIPS, ESQ. REBECCA ZUBATY, ESQ. ANDREW N. ROSENBERG, ESQ. 1285 Avenue of the Americas New York, NY 10019
For the Bank Lenders:	Crowell & Moring LLP By: TACIE YOON, ESQ. 1001 Pennsylvania Avenue, N.W. Washington, DC 20004
For Asbestos Property Damage Claimants:	Scott Law Group By: DARRELL SCOTT, ESQ. 1001 East Main Street, Suite 500 Sevierville, TN 37864
For National Union Fire Insurance Co.:	Zeichner Ellman & Krause, LLP By: ROBERT GUTTMANN, ESQ. 575 Lexington Avenue New York, NY 10022
For the Future Claimants Representatives:	Orrick, Herrington & Sutcliffe, LLP By: DEBRA FELDER, ESQ. JOSHUA CUTLER, ESQ. Washington Harbour 3050 K Street, N.W. Washington, D.C. 20007
For Federal Insurance Company:	Cozen O'Connor By: ILAN ROSENBERG, ESQ. 1900 Market Street Philadelphia, PA 19103
For Official Committee of Asbestos Personal Injury Claimants:	Anderson Kill & Olick By: ROBERT M. HORKOVICH, ESQ. 1251 Avenue of the Americas New York, NY 10020-1186 Caplin & Drysdale By: JAMES P. WEHNER, ESQ. One Thomas Circle, N.W., Suite 1100 Washington, District of Columbia 20005

TELEPHONIC APPEARANCES (CONT'D):

For Grace Certain Cancer Claimants:	Montgomery, McCracken, Walker & Rhoads, LLP By: NATALIE D. RAMSEY, ESQ. 300 Delaware Avenue, Ste. 750 Wilmington, DE 19801
For David T. Austern, the Future Claimants' Representative:	Phillips, Goldman & Spence, P.A. By: JOHN C. PHILLIPS, ESQ. 1200 North Broom Street Wilmington, DE 19806
For Allstate Insurance:	Cuyler Burk, LLP By: STEFANO CALOGERO, ESQ. ANDREW K. CRAIG, ESQ. Parsippany Corporate Center Four Century Drive Parsippany, NJ 07054
For the Asbestos Creditors Committee:	Ferry Joseph & Pearce, P.A. By: THEODORE TACCONELLI, ESQ. 824 Market Street, Suite 19899 Wilmington, DE 19899
For Ford, Marrin, Esposito, Witmeyer & Gleser:	Ford, Marrin, Esposito, Witmeyer & Gleser By: SHAYNE SPENCER, ESQ. ELIZABETH DeCRISTAFARO, ESQ. Wall Street Plaza New York, NY 10005
For Official Committee of Unsecured Creditors:	Duane Morris, LLP By: MICHAEL LASTOWSKI, ESQ. 1100 North Market Street, Suite 1200 Wilmington, DE 19801-1246
For Official Committee of Asbestos Property Damage Claimants:	Brandi Law Firm By: THOMAS J. BRANDI, ESQ. TERENCE D. EDWARDS, ESQ. 44 Montgomery St., Suite 1050 San Francisco, CA 94104 Lieff, Cabraser, Heimann & Bernstein By: ELIZABETH J. CABRASER, ESQ. Embarcadero Center West 275 Battery Street, Suite 3000 San Francisco, CA 94111

TELEPHONIC APPEARANCES (CONT'D):

For Official Committee: Riker, Danzig, Scherer, Hyland &
of Asbestos Property Perretti, LLP

Damage Claimants: By: TARA MONDELLI, ESQ.
CURTIS PLAZA, ESQ.

Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962

For the Libby Claimants: Cohn, Whitesell & Goldberg, LLP
By: CHRISTOPHER M. CANDON, ESQ.

101 Arch Street
Boston, MA 02110

For the Libby Claimants: Landis, Rath & Cobb, LLP
By: KERRI K. MUMFORD, ESQ.

JAMES S. GREEN, JR., ESQ.
919 Market Street, Suite 1800
Wilmington, DE 19899

For the Bank Lenders: Landis, Rath & Cobb, LLP
By: RICHARD COBB, ESQ.

919 Market Street, Suite 1800
Wilmington, DE 19899

For the PD Committee: Speights & Runyan
By: DANIEL SPEIGHTS, ESQ.

MARION FAIREY, ESQ.
ALAN RUNYAN, ESQ.
200 Jackson Avenue, East
Hampton, SC 29924

For Everest Reinsurance Company, et al.: Marks, O'Neill, O'Brien & Courtney LLP
By: BRIAN L. KASPRZAK, ESQ.

JOHN D. MATTEY, ESQ.
913 North Market Street
Suite 800
Wilmington, DE 19801

For Murray Capital Management Murray Capital Management, Inc.
By: MARTI MURRAY

For Normandy Hill Capital, LLP: Normandy Hill Capital, LLP
By: MATTHEW CANTOR

TELEPHONIC APPEARANCES (CONT'D):

For Anderson Memorial Hospital: Kozyak, Tropin & Throckmorton, PA
By: JOHN W. KOZYAK, ESQ.
DAVID L. ROSENDORF, ESQ.
2525 Ponce de Leon, 9th Floor
Miami, Florida 33134

For ZAI Claimants & various law firms: Hogan Firm Attorneys at Law
By: DANIEL K. HOGAN, ESQ.
1311 Delaware Avenue
Wilmington, DE 19801

For the U.S. Trustee: Office of the U.S. Trustee
By: DAVID KLAUDER, ESQ.
844 King Street, Suite 2313
Wilmington, DE 19801

For Arrowood Indemnity Co.: Bifferato Gentilotti LLC
By: GARVAN McDANIEL, ESQ.
800 North King Street
Wilmington, DE 19801

For AXA Belgium: Mendes & Mount
By: ANNA NEWSOM, ESQ.
750 Seventh Avenue
New York, NY 10019

For Royal Insurance: Wilson Elser Moskowitz Edelman
& Dicker, LLP
By: CARL PERNICONE, ESQ.
150 East 42nd Street
New York, NY 10017

For Official Committee of Asbestos Property Claimants: Richardson Patrick Westbrook &
Brickman, P.C.
By: EDWARD J. WESTBROOK, ESQ.
174 East Bay Street
Charleston, SC 29401

For Dow Jones News Wires: Dow Jones News Wires
By: PEG BRICKLEY

For the Equity Committee: Kramer Levin Naftalis & Frankel
By: DAVID E. BLABEY, JR., ESQ.
919 Third Avenue
New York, NY 10022

TELEPHONIC APPEARANCES (CONT'D):

For Hartford Financial Service Group:	Wilmer Wilmer Cutler Pickering Hale & Dorr, LLP By: MELANIE R. DRITZ, ESQ. 399 Park Avenue New York, NY 10022
For Travelers Casualty Surety Company:	Morris Nichols Arsht & Tunnell, LLP By: MATTHEW B. HARVEY 1201 N. Market Street PO Box 1347 Wilmington, DE 19899-1347
For Asbestos Property Damage Claimants:	Pryor Cashman, LLP By: RICHARD LEVY, ESQ. 410 Park Avenue New York, NY 10022
For David T. Austern, Future Claimants' Representative:	Lincoln International, LLC By: JOSEPH RADECKI

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*Admitted pursuant to stipulation to be filed

1 THE CLERK: All rise.

2 THE COURT: Good morning. Please be seated. This is
3 the continuation of the Phase II confirmation hearing in W.R.
4 Grace. The participants by phone today are Scott Baena, Janet
5 Baer, Ari Berman, David Bernick, David Blabey, Thomas Brandi,
6 Peg Brickley, Elizabeth Cabraser, Stefano Calogero, Christopher
7 Candon, Matthew Cantor, Richard Cobb, Tiffany Cobb, Jacob Cohn,
8 Andrew Craig, Joshua Cutler, Leslie Davis, Michael Davis,
9 Elizabeth DeCristofaro, Elizabeth Devine, Martin Dies, Melanie
10 Dritz, Terence Edwards, Patrick Ellard, Marion Fairey, Brett
11 Fallon, Debra Felder, Jordan Fisher, Theodore Freedman, Jeff
12 Friedman, Robert Gilbert, Christopher Greco, James Green, John
13 Greene, Robert Guttmann, Matthew Harvey, Daniel Hogan, Robert
14 Horkovich, Brian Kasprzak, David Klauder, Stuart Kovensky, John
15 Kozyak, Matthew Kramer, Michael Lastowski, Elli Leibenstein,
16 Richard Levy, Robert Craig Martin, John Matthey, Garvan
17 McDaniel, Tara Mondelli, Kerri Mumford, Marti Murray, Anna
18 Newsom, James O'Neill, Merritt Pardini, David Parsons, Carl
19 Pernicone, Margaret Phillips, John Phillips, Curtis Plaza, Mark
20 Plevin, Joseph Radecki, Natalie Ramsey, Andrew Rosenberg, Ilan
21 Rosenberg, David Rosendorf, Alan Runyan, Jay Sakalo, Darrell
22 Scott, Michael Shiner, Marnie Simon, Daniel Speights, Shayne
23 Spencer, Theodore Tacconelli, James Wehner, Edward Westbrook,
24 Clement Yee, Tacie Yoon, and Rebecca Zubaty.

25 And folks who are having discussions, you need to use

1 the attorney conference rooms, please. I can hear your
2 discussions rather than whoever's going to have the microphone.
3 So, please, that's what the conference rooms are for. If
4 you're going to speak, go there to use them. Good morning.
5 Are you ready to begin? All right.

6 MR. BERNICK: Good morning, Your Honor, we have
7 worked very hard over the evening to try to resolve the
8 document issues and other issues that were outstanding
9 yesterday. I think that Mr. -- obviously, Mr. Hughes is still
10 on the stand if anybody else has any crosses. I think some
11 people indicated that they did. We can proceed with that, and
12 then we'll recall Mr. Finke for any further cross with respect
13 to Mr. Finke. And, at that point, we will continue on with our
14 case on the second phase with Mr. Shelnitz and then Dr.
15 Peterson. Dr. Peterson is going to be here for all purposes
16 and needs to get back for family reasons as promptly as
17 possible. So we're going to call Mr. -- Dr. Peterson after Mr.
18 Shelnitz and then I think we'll be at the end of our phase --
19 Stage II of Phase II case --

20 THE COURT: All right.

21 MR. BERNICK: -- and it'll be up to the carriers.

22 THE COURT: Okay. Mr. Plevin? Just to remind you,
23 Mr. Hughes, you're still under oath.

24 MR. HUGHES: Yes.

25 MR. PLEVIN: Good morning.

Hughes - Cross/Plevin

15

1 MR. HUGHES: Good morning.

2 MR. PLEVIN: Your Honor, before I get started with
3 Mr. Hughes, just to follow up on what Mr. Bernick said. We
4 reached an agreement with the plan proponents in which I'd
5 mentioned yesterday that we had a witness. Our witness is now
6 not going to testify and plan proponents have agreed that our
7 Exhibits 10, 15 through 23 are going to come into evidence and
8 we'll be filing a stipulation that reflects that. And so the
9 witness that we were going to call is not going to be here
10 today.

11 JAY HUGHES, WITNESS, PREVIOUSLY SWORN

12 CONTINUED CROSS EXAMINATION

13 BY MR. PLEVIN:

14 Q Good morning, Mr. Hughes.

15 A Good morning.

16 Q Do you recall yesterday that Mr. Bernick drew a chart here
17 and asked you some questions about claims brought by, among
18 others, the State of Montana, BNSF, Scotts and Maryland
19 Casualty?

20 A Yes.

21 Q And he also talked about a claim brought by Fireman's
22 Fund?

23 A Yes.

24 Q And do you recall saying that those claims by those
25 entities I mentioned, Montana, BNSF, Scotts, Maryland Casualty

1 and Fireman's Fund, were all essentially for the same activity
2 for which plaintiffs were alleging Grace is liable?

3 A Yes.

4 Q That's not completely true, at least not with respect to
5 the Fireman's Fund claim, isn't that right?

6 A Well, the tort claims, the claims brought by the other
7 parties are -- they are tort claims being brought against
8 Maryland Casualty, State of Montana and the Scotts arising from
9 exposures to vermiculite. The Fireman's Fund claim is a
10 judgment, a surety claim on a judgment, but the underlying
11 claim that gave rise to the judgment was the same type of
12 claim, a tort claim, personal injury claim, arising from
13 exposures to Grace products.

14 Q All right. Well, let's dig a little deeper on this. The
15 plaintiff sued BNSF, correct? Tort plaintiff sued BNSF for
16 bodily injury?

17 A Yes.

18 Q And BNSF is alleging that Grace is liable for the bodily
19 injury claims that the plaintiffs are asserting against BNSF,
20 right?

21 A Yes.

22 Q And the -- and tort claimants also sued Scotts asserting
23 bodily injury claims against Scotts, correct?

24 A Yes.

25 Q And Scotts is then alleging that Grace has some obligation

Hughes - Cross/Plevin

17

1 to indemnify Scotts for the liability claims brought by the
2 tort claimants, correct?

3 A Yes.

4 Q And tort claimants are also suing the State of Montana
5 directly, correct?

6 A Yes.

7 Q And the State of Montana is claiming against Grace saying
8 that Grace is responsible in some way for the claims brought by
9 the tort claimants against the State of Montana, correct?

10 A Yes.

11 Q And then with respect to Maryland Casualty, tort claimants
12 are suing Maryland Casualty directly, correct?

13 A Yes.

14 Q And Maryland Casualty is then asserting that Grace is
15 liable to Maryland Casualty for the claims brought by the tort
16 claimants, correct?

17 A Yes.

18 Q Did any tort claimants sue Fireman's Fund in the Edwards
19 case?

20 A Not that I'm aware of, but, again, the underlying
21 obligation --

22 Q That's a yes or no question, Mr. Hughes. Did any -- to
23 your knowledge, did any of -- did the tort claimants in the
24 Edwards cases sue Fireman's Fund or Grace?

25 A Grace.

Hughes - Cross/Plevin

18

1 Q They asserted bodily injury claims against Grace, correct?

2 A Yes.

3 Q They didn't assert any claims against Fireman's Fund,
4 correct?

5 A No, but under the terms of the surety bond --

6 Q Fireman's Fund was not a defendant in that lawsuit, was
7 it?

8 A No, it wasn't.

9 Q Right. Now, there was a judgment in that lawsuit against
10 Grace, correct?

11 A Grace and Pittsburgh Corning.

12 Q And Grace decided to appeal the judgment?

13 A Yes.

14 Q Now, are you aware of the fact that if Grace had simply
15 appealed and had not put up some kind of security, the Edwards
16 claimants at that time could have started to execute their
17 judgment against Grace's assets?

18 A That's the purpose of an appeal bond is to stop that.

19 Q Okay. An appeal bond is one way of, in effect,
20 superceding the judgment, correct?

21 A Yes.

22 MR. BERNICK: Objection to the form of the question.

23 THE COURT: That's sustained.

24 MR. PLEVIN: Excuse me?

25 THE COURT: That's sustained.

1 Q Okay. The effect of an appeal bond is to preclude the
2 plaintiffs from executing against Grace's assets, correct?

3 A Yes.

4 Q An appeal bond is not the only way that Grace could have
5 obtained that relief, correct?

6 A Correct.

7 Q Grace could have simply put up enough money, \$43 million
8 or whatever, to stop the execution against Grace, correct?

9 A Yes.

10 Q And that would have cost Grace \$43 million out-of-pocket,
11 right?

12 A Again, but then they would have -- yes, I guess, yeah.

13 Q Grace could have taken out a bank loan and used that to
14 put up the \$43 million, correct?

15 A Yes.

16 Q And if Grace had done that, it would have had to have paid
17 interest to the bank, right?

18 A Right.

19 Q What was --

20 A But the difference is, again, that Grace, as I understand
21 it, we had a current obligation. In the contract between Grace
22 and Fireman's Fund, Fireman's Fund undertook the, for a
23 premium --

24 MR. PLEVIN: Your Honor, I move to strike this.

25 THE COURT: That's sustained. There's no question.

Hughes - Cross/Plevin

20

1 Q If Grace had put up -- if Grace had taken a bank loan to
2 put up \$43 million to stop the execution of the judgment
3 against Grace's assets, Grace would have had to have paid money
4 to a bank for interest, correct?

5 A Yes.

6 Q At that time, was Grace able to obtain loans at the prime
7 rate?

8 A I have no idea.

9 Q Okay. You don't know whether Grace had to pay more than
10 the prime rate for loans?

11 A I have no idea.

12 MR. BERNICK: Objection, this is irrelevant.

13 THE COURT: He -- well, he's answered he doesn't
14 know, so it doesn't matter.

15 Q The reason that Grace decided to post an appeal bond
16 rather than put up its own money was that it was a cheaper way
17 from Grace's perspective to stop the Edwards plaintiffs from
18 executing on the bond?

19 MR. BERNICK: Objection, relevance.

20 THE COURT: What is the relevance?

21 MR. PLEVIN: Your Honor, the relevance is that the
22 plan proponents have classified the Fireman's Fund indemnity
23 claim as a Class 6 asbestos claim and I'm trying to show that
24 it's no different than any other kind of credit or financing
25 transaction and that this was just substituted for other ways

1 that Grace could have dealt with that judgment and stopped the
2 execution against Grace's assets.

3 MR. BERNICK: Yeah, that actually is irrelevant to
4 the classification issue, completely irrelevant. The fact that
5 the bond is a financial instrument doesn't make it any
6 different from the fact that other people assert different
7 other types of obligations, common law obligations, written
8 indemnity obligations. It's just the fact that the motive is
9 financing is irrelevant to the question of whether it's an
10 indirect claim.

11 THE COURT: I'm not certain I understand why the
12 motive makes a difference. I think there has to be a logical
13 relationship in the classification and if asbestos underlying
14 liability is the logical classification, I'm not sure that
15 there's a problem with it.

16 MR. PLEVIN: Your Honor, that's Mr. Bernick's
17 argument --

18 THE COURT: Well, that's the theory.

19 MR. PLEVIN: -- and I understand that's his argument
20 and his theory. I have a different theory. My theory is that
21 if Grace had -- that this is a financing transaction. This is
22 not a claim over on a bodily injury claim. It is a financing
23 transaction where Fireman's Fund came in after the fact, was
24 solicited by Grace to put up a supersedeas bond. Fireman's
25 Fund did so and I have other arguments based on some of the

Hughes - Cross/Plevin

22

1 documentary evidence that I've just told the Court we've
2 stipulated to. I don't need to lay out the whole case right
3 now with Mr. Hughes. I think this is relevant to my theory
4 that I'd like to pursue.

5 THE COURT: I think it is relevant to your theory and
6 I'm not sure how the classification issue will work out, so
7 I'll overrule the objection. You may pursue this line.

8 (Attorney conversation)

9 UNIDENTIFIED ATTORNEY: Your Honor, I'm trying to
10 remember what the question was.

11 THE COURT: The last question that I had was Grace
12 decided to post an appeal bond rather than to put up cash
13 because it was cheaper, right? Objection to relevance.

14 Q Okay. Mr. Hughes, can you answer that question?

15 A I don't know whether it was cheaper or not. Again, I
16 would have been involved in the underlying lawsuit which was an
17 asbestos personal injury claim brought against the company. I
18 wouldn't have been necessarily involved in the decision on what
19 was the cheapest way to, you know, hold off the plaintiff's
20 ability to execute on the judgment while the appeal was
21 pending.

22 Q Who at Grace had that responsibility?

23 A The people in the treasury department.

24 Q And the people in the treasury department included Mr.
25 Tarola?

Hughes - Cross/Plevin/McCabe

23

1 A Yes.

2 Q He was the treasurer of Grace?

3 A He was the CFO.

4 Q And Mr. Hunter?

5 A Yes.

6 Q And what was his job at the time?

7 A He was involved in the treasury. I don't know his
8 specific title.

9 MR. PLEVIN: Thank you, Mr. Hughes. Your Honor, no
10 more questions.

11 THE COURT: Ms. McCabe?

12 CROSS EXAMINATION

13 BY MS. McCABE:

14 Q Good morning, Mr. Hughes.

15 A Good morning.

16 Q My name is Eileen McCabe and we've met and we've known
17 each other, I think, for quite a few years.

18 A Yes.

19 Q I'm here today representing Axa Belgium as successor to
20 Royal Belge and I just have hopefully what will be a few
21 questions --

22 A Sure.

23 Q -- for you today. Isn't it correct that Grace had filed
24 declaratory judgment actions against a number of its insurers
25 in the 1980s through the early 1990s?

1 A Yes.

2 Q And those coverage actions were lengthy, they went on for
3 a number of years, correct?

4 A Yes, they did.

5 Q They were hotly contested coverage actions?

6 A They were litigated, yes.

7 Q They were litigated. And those actions were pending in a
8 number of jurisdictions, weren't they?

9 A Yes.

10 Q Okay. And eventually Grace entered into settlements with
11 certain of its insurers that it had been involved in coverage
12 actions with, correct?

13 A Yes.

14 Q And those settlement agreements that Grace entered into
15 were different types of agreements with different insurers,
16 correct?

17 A Yes.

18 Q Okay. And I believe some of those have been referred to
19 as reimbursement agreements, are you aware of that?

20 A Yes.

21 Q And -- okay. And then other agreements were not
22 reimbursement agreements, correct?

23 A Yes.

24 Q All right. And isn't it also correct that Grace did not
25 enter into settlement agreements with a number of insurers?

Hughes - Cross/McCabe

25

1 A There are some unsettled insurer issues. I understand it,
2 yes.

3 Q Okay. For instance, Grace has not entered into any
4 settlement agreements with Royal Belge or Axa Belgium, correct?

5 A Not that I'm aware of.

6 Q Okay. Would it help if I refreshed your recollection in
7 that regard if I showed you some exhibits to the plan?

8 A Sure.

9 Q Okay.

10 THE COURT: Mona, can you call downstairs and see if
11 they can get a couple of extra chairs to put in? There's
12 always somebody standing back there and if we got some chairs
13 they wouldn't have to.

14 MS. McCABE: Your Honor, may I approach?

15 THE COURT: Yes, sir -- ma'am, I'm sorry.

16 MS. McCABE: That's all right.

17 THE COURT: I was looking at the back.

18 MR. GUY: Your Honor, if we could have just a second.
19 I think we could stipulate to this fact.

20 THE COURT: All right.

21 (Pause)

22 MR. GUY: Apparently not, Your Honor.

23 THE COURT: All right.

24 MS. McCABE: Okay. Your Honor, what we've done is
25 I've just excerpted certain portions of documents that have

Hughes - Cross/McCabe

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1 been marked exhibits in this case. I hope that's acceptable,
2 Your Honor. I gave the hard copies to you, the witness and the
3 opposing counsel because the actual documents are rather
4 lengthy, so I didn't bring the whole thing with me.

5 THE COURT: That's fine.

6 MS. McCABE: Okay.

7 Q If I could refer you, Mr. Hughes, to what's been -- what's
8 under Tab Number 2 in the booklet I just handed you?

9 A Yes.

10 Q Okay. It's a portion of what's been marked Plan
11 Proponents Exhibit 277.06. It's the Exhibit 6 to exhibit book,
12 asbestos insurance transfer agreement. Do you see that?

13 A Yes.

14 Q Okay. And if I could refer you, please, to the first
15 exhibit there which is -- I'm sorry, it's not an exhibit, it's
16 a schedule, Schedule 1, primary and excess insurance policies
17 that were or are applicable to asbestos related claims. It's
18 Page 1 of 20. Do you see that?

19 A Yes.

20 Q Okay. And then if you thumb through that, it's in
21 alphabetical order. On Page 16, there's a reference there to
22 Royal Belge midway down.

23 A Yes.

24 Q Okay. And if then I could have you please turn, sir, to
25 what's been -- or what's Schedule 2 here. It's, yeah, just

1 Schedule 2.

2 A Yes.

3 Q Do you see that? Okay. There's a listing here of
4 schedule of asbestos insurance settlement agreements. Do you
5 see that?

6 A Yes.

7 Q And there's a number of insurance companies listed there
8 and the date of the agreement is listed to the right. Am I
9 correct that that's the date of the settlement agreement with
10 that insurance company?

11 A That's what it appears to be.

12 Q Okay. And if you look through there, you do not see a
13 reference, do you, sir, to Royal Belge?

14 A No, I don't.

15 Q Okay. And if you turn to the next schedule which is
16 Schedule 3, the same thing. It's a -- this is captioned the
17 schedule of asbestos insurance reimbursement agreements, do you
18 see that?

19 A Yes.

20 Q And yesterday during your testimony you were discussing
21 your exchanges with the reimbursement insurers, correct?

22 A Yes.

23 Q And these were the entities that you were discussing, is
24 that correct?

25 A Yes.

Hughes - Cross/McCabe

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1 Q Okay. And if you look down on this list, there is not a
2 reference, is there, sir, to Royal Belge?

3 A No, there's not.

4 Q Does this refresh your recollection, sir, that there is,
5 in fact, no pre-petition settlement agreement with Royal Belge?

6 A I think the documents speak for themselves. I -- but I
7 assume they're accurate, yes.

8 Q Okay. Thank you. Mr. Hughes, your involvement with
9 insurers, Grace's insurers, was primarily with regard to
10 obtaining consent from certain insurers who had entered into
11 reimbursement agreements with Grace with regard to -- well, let
12 me strike that. That was too long. Your involvement with the
13 insurers was generally with regard to reimbursement insurers
14 and working to document certain requirements under those
15 settlement agreements, isn't that correct?

16 A Yes.

17 Q And you were really not involved with insurance carriers
18 otherwise, were you?

19 A What do you mean by otherwise?

20 Q Well, your interactions with insurers were primarily with
21 regard to the reimbursement insurers and with regard to
22 obtaining consent as required under certain of those
23 agreements, isn't that correct?

24 A Yeah, and I was also involved in, to the extent they
25 were -- exercise any audit rights under the agreements, as

1 well.

2 Q Under those settlement agreements?

3 A Yes.

4 Q Okay. And yesterday counsel went through with you what
5 has been marked Plan Proponents Exhibit 95 and it was a letter
6 written to Mendes & Mount and to me, in fact. And that letter,
7 sir, that's an example of the type of correspondence that you
8 had with the reimbursement insurers, wasn't that -- isn't that
9 correct?

10 A It's an example, yes.

11 Q All right. But those were the types of letters that you
12 sent to the reimbursement insurers who had agreements which
13 required consent from Grace, isn't that correct?

14 A Yes.

15 Q Okay. You didn't send those letters to Royal Belge, did
16 you, sir?

17 A No.

18 Q All right. You didn't send those letters to high level
19 excess carriers who were unsettled with Grace, did you?

20 A No.

21 Q And isn't it correct, sir, that Grace doesn't have any
22 settlement agreements with Royal Belge pursuant to which Royal
23 Belge has given up, waived or ceded any of its rights under its
24 insurance policies?

25 A Based on what you showed me, there's no agreement except

1 the original insurance policy.

2 Q Well, let me follow up on that. The Royal Belge -- to
3 your knowledge, Royal Belge hasn't waived or ceded any of its
4 rights under that insurance policy with Grace, isn't that
5 correct?

6 MR. BERNICK: Objection, lack of foundation.

7 THE COURT: You have to lay the foundation.

8 MS. McCABE: Foundation is the witness said based on
9 what he saw there and so I'm asking his understanding. Does he
10 understand that Royal Belge has waived any of its rights under
11 the policy.

12 MR. BERNICK: Yeah --

13 THE COURT: But you also established that his primary
14 function was to deal with the settlements and apparently there
15 are none. So you need to lay a foundation as to how he would
16 have this knowledge.

17 Q Okay. Do you have any knowledge of any interactions with
18 Royal Belge and W.R. Grace?

19 A Any?

20 Q Interactions.

21 A No, I'm not aware of any.

22 MS. McCABE: Okay. Your Honor, I think that's fine.
23 I don't need to follow up on that. And that's it for me, Mr.
24 Hughes.

25 THE WITNESS: Thank you.

Hughes - Cross/Schiavoni

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1 MR. BERNICK: Mr. -- please, please.

2 THE COURT: Mr. Schiavoni?

3 MR. SCHIAVONI: Mr. Schiavoni for Arrowood. Your
4 Honor, we had offered deposition designations in support of the
5 Arrowood settlement. Those deposition designations at that
6 time were unobjected to. We then redesignated them for this
7 proceeding and they were unobjected to. I would just offer
8 those, again, now in lieu of questioning the witness on those
9 and that would be from the June 11, 2009 deposition of Mr.
10 Hughes, Page 361, Line 22.

11 THE COURT: Wait, I'm sorry, you're going too fast
12 for me. June 11, 2009, page what?

13 MR. SCHIAVONI: Page 361, Line 22 --

14 THE COURT: All right.

15 MR. SCHIAVONI: -- through Page 378, Line 24. And,
16 Your Honor, I can hand those up.

17 THE COURT: All right.

18 MR. SCHIAVONI: And the only other thing I want to
19 do, Your Honor, is I have four questions just to lay a
20 foundation for a document that was offered, again, in support
21 of the Arrowood settlement so I can enter it into evidence.
22 And if I could approach the witness?

23 THE WITNESS: Sure.

24 CROSS EXAMINATION

25 BY MR. SCHIAVONI:

Hughes - Cross/Schiavoni

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1 Q Mr. Hughes, I've handed you a copy of a letter marked
2 Exhibit A-12. Have you seen a copy of Exhibit A-12 before?

3 A Yes, I have.

4 Q And can you tell us generally what Exhibit A-12 is?

5 A It's a letter from -- actually from Carl Pernicone and I
6 signed it for Grace where we communicate with Jon Moyers, who
7 is, I believe, was counsel for BNSF Railways in Montana
8 concerning the issue of coverages -- coverage -- insurance
9 coverage for BNSF in the asbestos/vermiculite claims against
10 them in Montana.

11 Q Were you authorized by Grace to cause A-12 to be signed on
12 your behalf for Grace?

13 A Yes, I was.

14 Q And did you issue this letter, A-12, in the ordinary
15 course of your duties at Grace?

16 A Yes, I did.

17 Q Prior to issuing this May 5 letter that's been marked as
18 A-12, did you review the 1995 Grace/Royal settlement?

19 A Yes, I did.

20 Q Okay. And, Mr. Hughes, did you speak to Mr. Posner and
21 others that were involved in the negotiation of the 1995
22 Grace/Royal settlement before issuing this letter?

23 A Yes, I did.

24 Q Were the statements that were made in Exhibit A-12
25 concerning the finality and the scope of the settlement of the

Hughes - Cross/Schiavoni

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1 Royal coverage true and correct at the time that you made them?

2 MR. PHILLIPS: Objection, no foundation.

3 THE CLERK: Your name, sir?

4 MR. PHILLIPS: Robert Phillips, sorry, for BNSF.

5 MR. SCHIAVONI: Your Honor, I'm asking the witness
6 whether when he signed the letter, the statements that he made
7 in the letter were true and correct. The witness signed the
8 letter. He has the foundation to tell the Court whether he
9 thought the statements that he was making were true and
10 correct.

11 MR. PHILLIPS: And objection, legal conclusion.

12 THE COURT: No, I think this is a factual statement
13 asking the witness of his knowledge of the transactions.
14 Overruled.

15 A At the time, based on my conversations with Mr. Posner and
16 others involved in the agreement, this was my -- this letter
17 reflected what I believed to be the facts concerning the Royal
18 Insurance settlement of -- 1995 settlement agreement, yes.

19 MR. SCHIAVONI: Okay. Your Honor, we'd offer Exhibit
20 A-12 into evidence.

21 MR. BERNICK: No objection.

22 MR. FINCH: No objection. Is that Arrowood-12,
23 Mr. --

24 MR. SCHIAVONI: Yes.

25 MR. FINCH: -- Schiavoni?

1 THE COURT: It's admitted.

2 MR. SCHIAVONI: Thank you, Your Honor. Thank you,
3 Mr. Hughes.

4 THE COURT: Give me a second, please.

5 (Pause)

6 THE COURT: All right. Ms. DeCristofaro?

7 MS. DeCRISTOFARO: Good morning. Elizabeth
8 DeCristofaro for Continental Casualty Company. Does the
9 witness have available the exhibits marked during his testimony
10 yesterday?

11 THE COURT: Which ones?

12 MS. DeCRISTOFARO: Specifically, Plan Proponent
13 Exhibit 1 and Plan Proponent Exhibit 95.

14 THE COURT: Who marked them?

15 MS. DeCRISTOFARO: They were marked and offered by
16 Mr. Bernick.

17 MR. BERNICK: Right. They were -- they should be --
18 they were, but I don't think that -- remember, we had the issue
19 with the notebook on that one? Is was the settlement -- is
20 that the settlement agreement?

21 MS. DeCRISTOFARO: Exhibit 1 is the Baron and Budd
22 settlement agreement and Exhibit 95 is a letter to Eileen
23 McCabe.

24 (Attorney conversation)

25 THE WITNESS: I have them here, too. I'm just trying

Hughes - Cross/DeCristofaro

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1 to find them. They're not organized the way -- oh, I have
2 them. I have the Baron and Budd settlement, yes.

3 MR. BERNICK: Do you have extra copies for the judge?

4 MR. DeCRISTOFARO: Do you have both documents, Mr.
5 Hughes?

6 THE WITNESS: Yes, I do.

7 CROSS EXAMINATION

8 BY MS. DeCRISTOFARO:

9 Q Plan Proponent Exhibit 95 was a letter from you to Eileen
10 McCabe regarding a settlement that Grace was about to make, is
11 that correct?

12 A Yes, it was.

13 Q And that letter was written in 1997?

14 A Yes.

15 Q And is it fair to say at that time that Grace was very
16 vigorously defending itself?

17 A Yes.

18 Q And if you look at the second -- the first two sentences
19 of Plan Proponents Exhibit 95, it refers to a very aggressive
20 strategy by W.R. Grace, doesn't it, in litigating asbestos
21 cases?

22 MR. BERNICK: Objection, this is completely
23 irrelevant.

24 MS. DeCRISTOFARO: It is not, Mr. Bernick.

25 MR. BERNICK: It is irrelevant, Your Honor.

Hughes - Cross/DeCristofaro

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1 MS. DeCRISTOFARO: Mr. Bernick opened the door on the
2 course of practices with respect to 1997 and 1998 and offered
3 that as a course of conduct relevant to the treatment of the
4 insurers under the plan and he opened the door. And he's
5 saying what happened in '97 and '98 is relevant to what should
6 happen now and he opened the door on that.

7 THE COURT: Well, I don't think that's the theory,
8 but nonetheless, it may be relevant. So the objection is
9 overruled.

10 Q And, at that time, Grace was very vigorously defending
11 itself, was it not?

12 A Yes, it was.

13 Q And the first two sentences there say that Baron and Budd
14 has recently tried Grace cases to verdict, including the recent
15 \$9.3 million verdict in Dallas County, Texas State Court. The
16 firm has announced publicly that in retaliation for Grace's
17 efforts to conduct discovery on the firm's practices, it
18 intends to try all serious cases against Grace. So you were
19 vigorously fighting with Baron and Budd at that time, were you
20 not?

21 A Yes, we were.

22 Q Okay. And with respect to Plan Proponent Exhibit 1, which
23 is a settlement agreement that you entered in with Baron and
24 Budd, at the time you entered into that agreement, you were not
25 using Baron and Budd as your advisor, were you?

Hughes - Cross/DeCristofaro

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1 A No.

2 Q No. And, in fact, to the overall point, you were
3 vigorously defending yourself at that time?

4 A Yes.

5 Q And to the extent that -- okay. Now, Mr. Bernick asked
6 you some questions and asked Mr. Posner some questions about
7 insurers who conducted audits or who had the right to consent.
8 And the testimony offered was that none of those insurers
9 offered an objection either by audit or by their right to
10 consent, is that correct?

11 MR. FINCH: Objection, compound.

12 THE COURT: It is --

13 Q Well, let's put it this way. Are you aware -- is it your
14 testimony that none of the insurers who had to consent did
15 consent? I mean, did not consent, sorry.

16 A To the Baron and Budd settlement?

17 Q I'm just trying to recap the testimony that you gave
18 before.

19 A To the Baron and Budd settlement or to generally?

20 Q Generally.

21 A Well, consent to settlement I view a little bit different
22 than to the audit issue because there were occasionally
23 differences of opinion about not with respect to settlement or
24 participate in the settlement decision, but as far as the
25 documentation after the fact and what was appropriate for there

Hughes - Cross/DeCristofaro

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1 when they conducted their audit.

2 Q Okay. In your view, should any of the insurers who
3 consented, should they not have consented?

4 MR. BERNICK: Objection, A, calls for an opinion, B,
5 it exceeds the scope of the examination, C, it's irrelevant.

6 MS. DeCRISTOFARO: Absolutely not, Your Honor.

7 MR. FINCH: Also, lack of foundation, Your Honor.

8 What an insurance company had in its mind is not something that
9 she's established to this witness that he would know.

10 MS. DeCRISTOFARO: Your Honor, if the question
11 here -- Mr. Bernick stood up and offered testimony that the
12 fact that no insurer objected either by audit or by withholding
13 their consent is relevant to the practices that they're putting
14 forward in this trust plan. If he put that at issue, the
15 question is should they have not consented.

16 THE COURT: But you can't ask this witness.

17 MS. DeCRISTOFARO: If it was reasonable for them to
18 consent, then it --

19 THE COURT: You can't ask this witness what was
20 reasonable in the mind of another person and you're asking him
21 for an opinion as to their judgment. He's not a representative
22 of the insurers.

23 MS. DeCRISTOFARO: No, he's not. But the point is,
24 unless the plan proponents say that in the exercise of
25 independent proper judgment an insurer should not have

Hughes - Cross/DeCristofaro

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1 consented, then that testimony should be struck and I move to
2 strike it because it's not relevant.

3 MR. BERNICK: Your Honor, this is -- Ms. DeCristofaro
4 is seeking to use this witness to establish their proposition
5 which goes to the question of whether their rights in some
6 fashion are fundamentally changed by the plan. The proffer of
7 the witness's testimony has nothing to do with that. It is
8 simply that the insurers are not being -- that had -- to the
9 extent the insurers had rights pre-petition, they didn't
10 exercise them and there was a course of conduct on the basis of
11 which this plan actually gives them more protection than they
12 would have had.

13 So the witness is only testifying about pre-petition
14 and pre-petition facts, the fact that there was a right and it
15 wasn't exercised, period. It can't be used on their case to
16 try to make their case by expressing opinions, which is what
17 this asks for, that are in service of their arguments with
18 regard to the plan.

19 THE COURT: It is asking for an opinion. He's not
20 been designated as an expert. The objection is sustained.

21 MS. DeCRISTOFARO: Your Honor, I think, though, Mr.
22 Bernick just made my point. He just said that he was -- they
23 were offering the fact that any insurer did not consent or did
24 not object to a settlement by audit as proof of course of
25 conduct as should be appropriate in the plan and our treatment

Hughes - Cross/DeCristofaro

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1 of the plan. If he offers that, then you're opening up the
2 collateral matter, and this goes to what I was saying. This is
3 so fundamentally different than the evidence that was offered
4 to you in Combustion Engineering. This is not an objective
5 program or plan. This is an argument that because someone
6 didn't agree -- didn't object to a settlement, that's
7 indicative of anything other that they exercised their
8 independent judgment that Grace was vigorously defending itself
9 and was reaching reasonable settlements.

10 THE COURT: Okay.

11 MS. DeCRISTOFARO: How does that prove a course of
12 conduct? And if I can't ask him that --

13 THE COURT: I don't know that it proves the course of
14 conduct. It's relevant to whether or not there is such a
15 course of conduct, that's the issue. And you may offer
16 whatever testimony you have to show that it is not reasonable,
17 but you cannot ask a representative of Grace whether the
18 insurer's judgment was reasonable. He can't testify to that.
19 He doesn't know.

20 MS. DeCRISTOFARO: But, Your Honor, I'm not asking
21 him whether the insurers -- I think without proof that
22 someone -- that's why the whole line of the proffer made by Mr.
23 Bernick of this witness's testimony was improper because it's
24 not probative of --

25 THE COURT: It is probative. It's relevant to the

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1 determination.

2 MS. DeCRISTOFARO: It's not probative if --

3 THE COURT: Well, I'm sorry.

4 MS. DeCRISTOFARO: -- you don't get into --

5 THE COURT: As the finder of fact, I think it is.

6 MS. DeCRISTOFARO: Your --

7 THE COURT: So --

8 MS. DeCRISTOFARO: -- Honor, really, I'm sorry, I
9 just wanted to finish that.

10 MR. BERNICK: Can we move along?

11 MS. DeCRISTOFARO: It's not probative because unless
12 you get into whether each settlement was reasonable or not,
13 which we don't want to, it's not probative because if you --

14 THE COURT: That's not the point, Ms. DeCristofaro.
15 The point that the debtor is trying to establish, whether it
16 turns out to be established, whether it turns out to be
17 relevant, whether it turns out to have anything to do with the
18 plan itself is that there was a pre-petition course of conduct
19 that this plan looks at that pre-petition course of conduct
20 and, essentially, incorporates it with, in the debtor's view,
21 some additional protections. I'm not sure the insurers will
22 agree with that, but that's the debtor's point of view.

23 It is relevant to substantiate the fact that as to
24 the insurers who had settlement -- who had rights to consent or
25 not consent to settlement pre-petition that they were not

Hughes - Cross/DeCristofaro

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1 exercised. It is relevant to that point.

2 MR. BROWN: Your Honor --

3 THE COURT: I've ruled. This is ten minutes after
4 I've ruled --

5 MS. DeCRISTOFARO: Okay.

6 THE COURT: -- so let's move on.

7 MR. BROWN: Your Honor, just one point of
8 clarification. I don't mean to interrupt, but we're slipping
9 into imprecise language, again.

10 MS. DeCRISTOFARO: Your --

11 MR. BROWN: And the testimony that was offered
12 yesterday by Mr. Hughes related to the insurers that had
13 asbestos reinsurance agreements.

14 THE COURT: Yes, it did.

15 MR. LOCKWOOD: Reimbursement agreements.

16 MR. BROWN: I'm sorry, asbestos reimbursement
17 agreements.

18 THE COURT: Reimbursement agreements, yes.

19 MR. BERNICK: We would agree with that. We're not
20 trying to slip into that area. This is all being prompted
21 really by interrogation from an insurer.

22 THE COURT: Okay.

23 MR. BERNICK: We've always recognized that.

24 THE COURT: I have ruled folks. Let's move on.

25 MS. DeCRISTOFARO: Yes, Your Honor, I just only

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1 wanted to make my point of what I was offering this from.

2 Q Just a few more questions going to the weight of the
3 consideration of course of conduct. This settlement agreement
4 was entered into in 1998, correct?

5 A Actually, in December of '97 --

6 Q Sorry, '97, okay.

7 A -- and the '98. I think -- I may have misspoke earlier.

8 Q And you testified that in your position at Grace that
9 you've kept track of what's happening in asbestos litigation,
10 is that correct?

11 A Yes, I have.

12 Q And you're aware that there's been significant changes in
13 the field of asbestos litigation since 1997?

14 MR. BERNICK: Well, could we have more specification
15 as to time period? And, again, I think this is completely
16 irrelevant, but we can at least get a time frame? That's ten
17 years ago.

18 MS. DeCRISTOFARO: That's my point.

19 MR. BERNICK: Okay. Well, if that's your point, the
20 question ought to be confined to a particular time period,
21 unless you want to have him express opinions on what's happened
22 since the petition was filed as to which he has not testified.

23 MS. DeCRISTOFARO: Again, Your Honor, they're
24 offering a course of conduct on direct from 1997.

25 THE COURT: Yes, this is relevant to the witness's

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1 testimony. He said that he's kept track of litigation. He can
2 either -- he can qualify his answer if he needs to. You can
3 answer, Mr. Hughes.

4 Q All right. Can you answer that question, Mr. Hughes?

5 A Could you repeat the question?

6 Q Yes. Has there been significant develops in the field
7 of -- development -- legal developments in the field of
8 asbestos litigation since 1997? Such, for example, is asbestos
9 or tort reform, in the area of tort reform.

10 MR. BERNICK: That calls for a legal conclusion.

11 THE COURT: It does. That's sustained.

12 Q Are you aware of any changes that would affect whether you
13 would have entered into this settlement agreement since --
14 today, as opposed to 1997?

15 (Attorney conversation)

16 MR. BERNICK: Objection, Your Honor. A, that asks
17 for speculation and, B, it calls for an opinion and, C, it's
18 irrelevant.

19 THE COURT: Sustained.

20 MS. DeCRISTOFARO: Your Honor, just quickly, Mr.
21 Bernick, again, is offering these documents dated ten years
22 ago, more than ten years ago, 12 years ago, as evidence of what
23 should occur now. And I'm only trying to --

24 MR. FINCH: Objection, Your Honor, this is more in
25 the nature of closing argument.

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1 THE COURT: It is in the nature of closing argument
2 and that isn't the proffer.

3 MS. DeCRISTOFARO: Okay. All right. Your Honor, I
4 have no further questions based on Your Honor's ruling.

5 THE COURT: Mr. Davis?

6 MR. BERNICK: Anybody else? Ah, ha.

7 (Attorney conversation)

8 CROSS EXAMINATION

9 BY MR. DAVIS:

10 Q Good morning, Mr. Hughes. Michael Davis on behalf of
11 Nation Union Fire Insurance Company --

12 A Good morning.

13 Q -- Pittsburgh, PA. Do you recall that Mr. Plevin asked
14 you a series of questions about the Fireman's Fund bond this
15 morning?

16 A Yes.

17 Q And he distinguished it from Scotts and he distinguished
18 it from Maryland and he distinguished it from BNSF on grounds
19 that those defendants were -- had been sued for their own
20 conduct whereas Fireman's Fund had undertaken the issue of bond
21 at the request of Grace, is that correct?

22 MR. BERNICK: I've got -- sorry, that statement "is
23 that correct" seeks his endorsement of what you take to be Mr.
24 Plevin's arguments.

25 THE COURT: That's sustained. Restate the question,

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1 please.

2 Q Did you acknowledge that there was a difference in that
3 BNSF, Scotts and Maryland were sued for their own conduct,
4 whereas Fireman's Fund had been -- Fireman's Fund had issued a
5 bond at the request of Grace?

6 MR. BERNICK: Objection to the form of the question.
7 Seeks to recharacterize the record. Record is whatever it is.
8 If we could have a new question, that would be good.

9 THE COURT: I don't think that was the witness's
10 testimony. It is -- I think it is assuming a fact not in
11 evidence. You'll have to restate the question.

12 Q Well, let me just get to the point. National Union issued
13 a bond at the request of Grace, correct?

14 A Yes.

15 Q National Union did not issue that bond because of its own
16 conduct, did it?

17 MR. BERNICK: Objection to the form of -- own
18 tortuous underlying conduct. Objection to the form of the
19 question.

20 THE COURT: Sustained.

21 MR. DAVIS: I'll accept the correction.

22 Q National Union did not issue the bond on account of its
23 own tortuous underlying conduct, did it?

24 A No, it --

25 Q Thank you.

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1 A -- issued the bond based on a settlement agreement
2 involving asbestos related claims against W.R. Grace.

3 Q At the request of W.R. Grace, correct?

4 A Yes.

5 MR. DAVIS: Thank you.

6 A Again, the underlying claims or asbestos personal injury
7 claims.

8 THE COURT: When a witness is talking, it would be
9 nice if you don't walk away.

10 MR. DAVIS: I'm sorry.

11 (Attorney conversation)

12 THE COURT: Mr. Demmy, good morning.

13 MR. DEMMY: Yes, Your Honor.

14 CROSS EXAMINATION

15 BY MR. DEMMY:

16 Q Mr. Hughes, good morning. John Demmy on behalf of
17 Fireman's Fund Insurance Company as to issues apart from the
18 surety bond issues that Mr. Plevin asked you about earlier. I
19 wanted to make that point clear at the outset. But also on
20 behalf of Allianz SpA, which was formerly known as Riunione
21 Adriatica Di Sicurta, and also for Allianz SE, formerly known
22 as Allianz Aktiengesellschaft. And --

23 UNIDENTIFIED ATTORNEY: Objection.

24 Q -- I hope I got that right.

25 MR. BERNICK: Aktiengesellschaft, but that's, you

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1 know --

2 Q I'll accept the correction.

3 THE COURT: Just so we get the -- a description in
4 writing of how to spell it all.

5 MR. DEMMY: My questions may be less time than it
6 took me to say the name of the client.

7 MR. BERNICK: Well, that would be great.

8 Q Mr. -- AG, thank you. Mr. Hughes, do you have an
9 understanding at all that Grace contends that Fireman's Fund
10 Insurance Company issued insurance policies to Grace that
11 covered asbestos claims, generally?

12 A Yes.

13 Q Same question for both of the Allianz entities. Do you
14 have an understanding that Grace contends that they both issued
15 insurance policies to Grace?

16 A Yes.

17 Q Do you have any understanding with respect to the terms of
18 any of those policies?

19 A No, not specific terms. I don't --

20 Q Do you have any -- do you have a general understanding of
21 the terms of those policies?

22 A Yes, general understanding.

23 Q What's your general understanding?

24 A That they were excess layer over the comprehensive general
25 liability policies for the period of time pre -- I guess, you

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1 know, whenever asbestos exclusions were generally included in
2 those kinds of policies.

3 Q You would agree that they're what we would characterize as
4 a high level excess policy, correct?

5 A I don't know. I don't know where they fit in
6 specifically, so I wouldn't want to characterize them in that
7 way.

8 Q But they're excess policies?

9 A That's my understanding.

10 Q Did Fireman's Fund Insurance Company ever enter into an
11 agreement with Grace that we've been talking about in
12 connection with your testimony that we've been calling
13 reimbursement agreements?

14 A I'd have to take a look at the list that was just shown to
15 me by --

16 Q Would you like to take a look at that list to refresh your
17 recollection?

18 MR. BERNICK: Well, but, if it's on the list, I mean,
19 if he doesn't -- if he knows, he knows, if he doesn't, he
20 doesn't. Just reading from documents is not --

21 Q Do you have --

22 THE COURT: The question was will it refresh his
23 recollection. It's proper. You may refresh his recollection,
24 Mr. Demmy.

25 Q Do you -- let me try to short circuit this. Do you have

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1 any independent recollection other than what's on the list
2 that's already been discussed previously?

3 A No, I don't.

4 Q Okay. Same question as to the two Allianz entities. Do
5 you have any recollection, other than what's on that list?

6 A No, I don't.

7 Q Okay. So if they're not on the list, Grace did not have
8 reimbursement agreements with either of those three insurers,
9 correct?

10 (Attorney conversation)

11 A Again, based on -- I assume that the lists are accurate.

12 Q All right. Do you know whether or not Fireman's Fund
13 Insurance Company ever waived any of its rights under any of
14 the insurance policies that Grace contends it issued to Grace
15 --

16 MR. BERNICK: Objection, lack of foundation. Calls
17 for a legal conclusion.

18 THE COURT: It's a do you know. Overruled.

19 A I don't know.

20 Q Okay. You don't know one way or the other?

21 A Right.

22 Q Were any claims ever tendered by Grace to Fireman's Fund
23 Insurance Company?

24 A I don't know.

25 Q Do you know whether either of the Allianz companies waived

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1 any of their rights under any of their insurance policies?

2 A I don't know.

3 Q Do you know if any claims were ever tendered to either of
4 the Allianz companies?

5 A I don't know.

6 MR. DEMMY: That's all the questions I have, Your
7 Honor.

8 THE COURT: I need a second to get caught up here.

9 (Pause)

10 MR. BERNICK: New, anybody else?

11 THE COURT: Good morning.

12 MR. CARIGNAN: Good morning.

13 CROSS EXAMINATION

14 BY MR. CARIGNAN:

15 Q Good morning, sir, how are you?

16 A Great.

17 Q My name is James Carignan. I represent Longacre Master
18 Fund. Yesterday, Mr. Bernick asked you some questions about
19 the basis for the claim of Longacre, do you recall that
20 testimony?

21 A Yes.

22 Q And would it be a fair characterization to say that -- of
23 your testimony to say that Longacre had purchased a claim
24 formerly owned by National Union?

25 A Yes.

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1 Q And what was that National Union claim based on?

2 MR. BERNICK: Your Honor, this is -- we've already
3 had a gentleman from National Union --

4 THE COURT: This is a different party. Go ahead, Mr.
5 Carignan.

6 A It was payments that had been made to the claimants in
7 connection with the National Union surety bond that had been
8 used to -- for payments with respect to the Reaud, Morgan &
9 Quinn settlement agreement.

10 Q So National Union had posted a surety bond, correct?

11 A Yes.

12 Q And that surety bond was intended to secure debtor's
13 obligations under settlement agreements with various asbestos
14 personal injury claimants?

15 A Yes.

16 Q And the basis of National Union's claim was for repayments
17 of those amounts that National Union had paid out under those
18 surety bonds?

19 A Yes.

20 Q And that was pursuant to a reimbursement agreement issued
21 in connection with those surety bonds?

22 A It was pursuant to the terms of the surety bond.

23 MR. LOCKWOOD: Objection to form. If he's using --

24 THE COURT: You're microphone's not on, Mr. Lockwood.

25 MR. LOCKWOOD: Objection to form. He used the term

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1 reimbursement agreement. I don't know whether that's intended
2 to refer to what we've been taking about as insurance
3 reimbursement agreements or whether he's using it in a sort of
4 general sense of describing this particular surety agreement.

5 THE COURT: I think that's sustained, just because of
6 the use of that particular term in this case. If you could
7 restate the question so we're all clear, please?

8 Q Do you know whether the debtors owed National Union any
9 obligation in connection with National Union's payment to
10 settling parties on account of their surety bonds?

11 MR. BERNICK: Objection to the form. Is it do you
12 know?

13 THE COURT: Yes. Overruled.

14 A Yes.

15 Q And what were those obligations?

16 A I'm not sure specifically, but under the terms of the
17 agreement --

18 MR. BERNICK: Wait. I was going to object for lack
19 of foundation, then the witness began to answer. I'm going to
20 object on grounds of lack of foundation.

21 THE COURT: No, he said he knew.

22 MR. CARIGNAN: Judge, I just asked --

23 THE COURT: It's overruled.

24 A Could you repeat the question?

25 Q What were the obligations that debtors owed to National

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1 Union on account of National Union's payment to settlement
2 parties under the surety bonds?

3 A Generally, Grace had an obligation to reimburse National
4 Union for any amounts that it ultimately paid to the claimants
5 for the personal injury claims.

6 Q But you don't know whether those obligations arose from
7 the surety bonds themselves or from any agreements issued in
8 connection with those surety bonds?

9 A That's correct. I don't know the answer to that.

10 Q Are you aware whether National Union ever issued any
11 insurance policies to the debtors?

12 MR. BERNICK: You mean liability policies? Objection
13 to form.

14 THE COURT: That's sustained. It's -- obviously,
15 he's testified about a surety bond. That's not an insurance
16 policy, but I think you need to be a little bit more clear.

17 Q Are you aware whether National Union ever issued any
18 insurance liability policies to the debtors?

19 A Not without relying on the schedules that have been
20 produced in this case.

21 Q But you don't have any memory of anything like that?

22 A I recall there was an issue with setoff in terms of
23 National Union, but I don't know if it was National Union or
24 another AIG company.

25 MR. CARIGNAN: Judge, I have no further questions.

1 But, yesterday, after the conclusion of the proceedings, the
2 debtors graciously agreed to my request to be able to admit
3 certain exhibits or at least seek the admission of certain
4 exhibits at the end of my questioning of this witness --

5 THE COURT: All right.

6 MR. CARIGNAN: -- if I could. The first exhibit I
7 handed to your clerk yesterday, but I have another copy here if
8 Your Honor would like to see it. If I may approach?

9 THE COURT: Yes.

10 (Attorney conversation)

11 THE COURT: Thank you.

12 MR. CARIGNAN: This is a -- and I've marked it as
13 Long-1. And this is a stipulation of facts which consents to
14 the admissibility of certain exhibits, most of which are
15 already part of the record, and if I may briefly just run
16 through them.

17 MR. BERNICK: Wait, how many are there?

18 MR. CARIGNAN: The order appointing the future
19 asbestos PI claimants representative which is Docket Entry
20 5645, the settlement agreement and order approving that
21 settlement agreement respecting the National Union claim which
22 is adversary Docket Entry 115 in Adversary Proceeding Number
23 02-1657, the notice of transfer of the National Union claim to
24 Longacre which is Docket Entry 17648 and certain exhibits
25 specifically two and four to the plan exhibit book available on

1 the docket at Docket Entry 20874. The items that are not
2 already part of the record, but which nevertheless the plan
3 proponents have consented to admit are the proof of claim of
4 National Union and the assignment of that claim, the assignment
5 agreement of that claim to Longacre which is appended to the
6 stipulation of facts. And I would respectfully request that
7 that stipulation be admitted as evidence.

8 THE COURT: Could you go back to the adversary docket
9 number for the settlement and the order that approved it with
10 National Union? What was the docket number?

11 MR. CARIGNAN: Adversary Docket Number 115, according
12 to my notes.

13 THE COURT: All right. Thank you. Any objection?

14 MR. LOCKWOOD: No.

15 THE COURT: Okay. Let me get a note here.
16 Longacre-1, which is the stipulation, is admitted with the
17 attachments that include the proof of claim and notice of
18 transfer and the other documents that have just been
19 articulated on the record which are Docket Numbers 115 in
20 Adversary 02-1657, Docket Number 17648 in the main case, and
21 Docket Number 20874 in the main case.

22 MR. CARIGNAN: Thank you, Your Honor.

23 THE COURT: Oh, and Docket Number 5645 in the main
24 case. All right.

25 MR. CARIGNAN: Thank you, Judge. We were not,

1 unfortunately, able to agree as to the admissibility of one
2 exhibit which I would like to have admitted, and that is the
3 stipulation regarding the classification of claims of Morgan
4 Stanley Senior Funding, Inc. It's available on the docket at
5 DI-21722 and I have a certified copy here, if I may approach?

6 THE COURT: All right.

7 MR. CARIGNAN: And, Your Honor, this exhibit I've
8 marked as Long-2.

9 THE COURT: All right. And what's the relevance?

10 MR. CARIGNAN: The relevance, Your Honor, Longacre, a
11 chief component of its confirmation objection is that its claim
12 is improperly classified in Class 6 rather than where we think
13 it should be which is Class 9. And in support of that
14 argument, we argue that similarly situated or substantially
15 similar claims are classified in Class 9 and the relevance of
16 this exhibit is that this is but one example of those
17 substantially similar claims.

18 MR. BERNICK: Your Honor, it's not relevant. It also
19 violates Rule 408. This was a settlement. It shouldn't be
20 introduced for the purpose of adjudicating some issue that's in
21 dispute and apart from the fact that we're all waiting here and
22 dealing with this. It really should be taken up later. There
23 are significant differences, in fact, between the situation of
24 Morgan Stanley and the situation of the other people as to whom
25 we have not reached agreement because we believe that they're

1 properly part of Class 6.

2 I don't believe that it's appropriate to argue those
3 differences, in fact, while we have a witness on the stand.
4 And I particularly don't think it's appropriate to argue them
5 because it violates Rule 408. Settlements get reached all
6 kinds of places in this case and we don't have a settlement
7 with Longacre and National Union. We do with those folks, and
8 that's not a proper subject for inquiry in this court. And
9 it's certainly not appropriate to take the time of the witness
10 and 50 lawyers sitting here while we deal with it in the course
11 of what's supposed to be a proceeding on live testimony.

12 MR. CARIGNAN: Well, again, debtor's counsel, you
13 know, they approved my request to seek to admit these exhibits
14 at this time, Your Honor.

15 MR. BERNICK: We actually approved --

16 MR. CARIGNAN: It's been publicly filed, it's
17 substantially similar and it should be admitted if it's --

18 THE COURT: Well, I don't know how it's substantially
19 similar. I mean, I just don't know. So you're going to have
20 to produce some evidence that explains to me how it is
21 substantially similar. So as not to hold this witness up
22 because I understand you're not intending to ask this witness,
23 Mr. Hughes, about Longacre-2, correct?

24 MR. CARIGNAN: Correct.

25 THE COURT: All right. So, with respect to

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1 Longacre-2, I'll defer that admission until I -- whoever the
2 proper witness is that you're going to ask about this document
3 can testify.

4 MR. CARIGNAN: Thank you.

5 MR. BERNICK: I know that if I stand up, somebody
6 else will stand up to ask questions, so --

7 THE COURT: Anyone else for Mr. Hughes? Okay, Mr.
8 Bernick.

9 MR. BERNICK: Okay. I just have a couple follow up
10 questions if I could get to the mic.

11 REDIRECT EXAMINATION

12 BY MR. BERNICK:

13 Q Mr. Hughes, I want to begin with the questions that Ms.
14 DeCristofaro asked you and in service of trying to expedite
15 this examination in that score, she asked you whether at the
16 time pre-petition that the settlements were entered into with
17 the criteria that you indicated.

18 THE CLERK: Is your mic on, Mr. Bernick?

19 MR. BERNICK: Yes, I think -- I need to move it up a
20 little bit closer. Is that better? Okay.

21 Q At the time that we, Grace, entered into the settlement
22 that's documented as Plan Proponents 1 with Baron and Budd,
23 whether Grace was vigorously litigating, do you recall that?

24 A Yes.

25 Q She also asked you some questions later on about

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1 litigation developments that have taken place in succeeding
2 years. Let me just ask you as a general proposition,
3 pre-petition, were there from time to time --

4 MS. DeCRISTOFARO: Objection, Your Honor. He was not
5 allowed to answer my question regarding that.

6 MR. BERNICK: To the contrary, he was.

7 MS. DeCRISTOFARO: Mr. Bernick objected and said he
8 couldn't answer the question regarding developments.

9 MR. BERNICK: No, that was overruled.

10 MS. DeCRISTOFARO: I was not allowed to --

11 THE COURT: Just a minutes, folks.

12 MS. DeCRISTOFARO: Sorry.

13 THE COURT: Actually, I think I overruled the
14 objection, but you didn't pursue the line of questioning. It's
15 -- I overruled the objection stating that the aggressive
16 litigation strategy issues were relevant to the course of
17 conduct. You then asked about following up the information
18 and, I'm sorry, my note does not indicate here what I did.
19 Let's see.

20 MS. DeCRISTOFARO: Your Honor, subsequently, I asked
21 him questions about developments in asbestos litigation.

22 THE COURT: Yes.

23 MS. DeCRISTOFARO: Mr. Bernick objected and said that
24 required a legal opinion and you directed him not to answer or
25 you overruled. You sustained his objection and told me --

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1 THE COURT: I did sustain an objection to one
2 question that I thought called for a legal conclusion, that's
3 true.

4 MR. BERNICK: You know, the world's not going to
5 change. I think it's going to be self-evident from what Your
6 Honor already knows.

7 THE COURT: I don't think your microphone's working,
8 Mr. Bernick.

9 MR. BERNICK: I'm sorry. It could be I need a
10 battery. In more ways than one, but we'll pursue. I think
11 it's already been evident from other testimony that at all
12 times the litigation environment changes. Let me get to the
13 comparison that I wanted to draw. I think you're right. It
14 does -- it kind of goes in and out.

15 THE COURT: It's fading in and out. Is there another
16 one? There's another one here. Maybe we can get these
17 batteries changed.

18 (Pause)

19 MR. BERNICK: I guess after all this preparation,
20 this better be good, right?

21 Q Post-petition. We have a settlement in the plan with TDP
22 criteria. Are you familiar with the fact that we have a plan
23 that has settlement criteria set forth in the TDP and
24 elsewhere?

25 A Yes, I am.

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1 Q Could you tell me about whether there was any litigation
2 which led to and in the context of which that plan was agreed?

3 A Yes, there was.

4 Q What was that called?

5 A The estimation litigation.

6 Q To your observation, was it every bit as aggressive,
7 intense, hotly contested as the litigation that Grace was
8 pursuing in the context of which it reached settlements
9 pre-petition?

10 A Yes, it was.

11 Q I want to talk to you about the comparisons that were made
12 by Fireman's Fund, National Union. I guess it's Fireman's Fund
13 and National Union. You have a tort plaintiff who is suing
14 BNSF. BNSF then has an action that it wants to pursue over
15 against Grace pursuant to a written indemnity, without getting
16 into whether and to what extent that indemnity applies. Do you
17 recall covering this on your direct examination?

18 A Yes.

19 Q Okay. Now, we have a tort plaintiff, Edwards, sues Grace.
20 We with each other so far?

21 A Yes, we are. Yes, I am.

22 Q Grace wants to take an appeal and it picks up the
23 telephone and rings I guess it's National Union or --

24 A No.

25 Q -- it picks up the telephone and rings Fireman's Fund.

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1 A Yes.

2 Q So Fireman's Fund now comes into the picture. Could you
3 tell me with the bond that's entered into what becomes the
4 relationship between Fireman's Fund and Grace?

5 MR. PLEVIN: Objection, calls for legal conclusion.

6 THE COURT: Sustained.

7 Q As a fact, factually, what was the relationship between
8 Fireman's Fund and Grace at that point?

9 MR. PLEVIN: Objection, form.

10 THE COURT: Sustained.

11 Q Factually, what was the deal that was done between
12 Fireman's Fund and Grace? This was gone over by Mr. Plevin,
13 but go ahead. Factually, what becomes the deal between
14 Fireman's Fund and Grace?

15 A Well, it's a -- creates a relationship where Fireman's
16 Fund is a surety, Grace is the principal and Edwards claimants,
17 I guess, are the obligee and Fireman's Fund is -- takes on, in
18 the event that Grace is unable to pay the judgment or any
19 judgment resulting that they would make payments to the
20 claimants in Grace's stead, I guess is a way to put it.

21 Q So Fireman's Fund, I think one prong that you indicated
22 was a surety?

23 A Yes.

24 Q In connection with the surety arrangement, was there also
25 an indemnification that Grace agreed to?

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1 A Yes, there was.

2 Q And that would run from Grace to whom?

3 A Back to Fireman's Fund.

4 Q Was that a written indemnity?

5 A I believe so, yes.

6 Q So it's between Grace and the Fireman's Fund, the
7 indemnity would be an indemnity that would parallel BNSF versus
8 Grace?

9 A Yes.

10 MR. PLEVIN: Objection, calls for legal conclusion.

11 MR. BERNICK: Well, that was a parallel that was
12 specifically asked by Mr. Plevin and drawn in exactly the same
13 terms.

14 MR. PLEVIN: I asked individual questions about
15 individual transactions. I didn't ask him to compare them,
16 Your Honor.

17 THE COURT: It's sustained.

18 Q Let's talk about the surety part of the arrangement. In
19 the event that Grace did not pay the tort claimant, who paid
20 the tort claimant?

21 A Fireman's Fund.

22 Q So did I draw that arrow right?

23 A Yes.

24 Q Are you familiar with a term stepping into the shoes of
25 another party?

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1 A Yes.

2 Q Tell us whether or not Fireman's Fund by virtue of
3 becoming a surety, in fact, as you understood it, stepped into
4 the shoes of the tortfeasor -- alleged tortfeasor.

5 A Yes, it did.

6 Q And to the extent that Fireman's Fund stepped into the
7 shoes of the alleged tortfeasor, tell me whether Fireman's --
8 whether or not Fireman's Fund -- strike that. Tell me whether
9 or not the tortfeasor could proceed directly against Fireman's
10 Fund in the same fashion that the tortfeasor could proceed
11 directly against BNSF.

12 MR. PLEVIN: Objection. Calls for legal conclusion
13 and form.

14 Q As you understood it --

15 A I think you mean --

16 MR. PLEVIN: Objection.

17 A -- plaintiff.

18 Q The plaintiff's tortfeasor.

19 A Yeah -- yes.

20 MR. PLEVIN: Your Honor, there was no ruling on my
21 objection.

22 THE COURT: I'm sorry, I can't hear you Mr. Plevin.

23 MR. PLEVIN: I objected that that was both calling
24 for legal conclusion and objected to the form of the question.

25 THE COURT: Whether or not the plaintiff could

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1 proceed directly against Fireman's Fund?

2 MR. PLEVIN: And the comparison. He had both the --
3 he had several things happening in that question.

4 THE COURT: All right. Let's break the questions
5 down into pieces, please.

6 Q Okay. Could the tort plaintiff under those circumstances
7 by virtue of Fireman's Fund being the surety in Grace not
8 paying, could the tort plaintiff proceed directly against
9 Fireman's Fund based upon its tort entitlement?

10 A Yes.

11 MR. PLEVIN: Calls for a legal conclusion, Your
12 Honor.

13 Q As you understood it?

14 MR. PLEVIN: Objection, calls for a legal conclusion.
15 He's asking the witness to interpret --

16 THE COURT: He is.

17 MR. PLEVIN: -- the rights of the claimants.

18 THE COURT: He is. That's a legal conclusion. It's
19 sustained. There has to be a document that sets this out.

20 MR. BERNICK: Yes, there is.

21 THE COURT: Then the document ought to state whether
22 or not --

23 MR. BERNICK: Well, let's just do it, go ahead and do
24 that. I thought it would be easier to do it this way.

25 Q I want to show you Fireman's Fund Exhibits 2 and 3. Do we

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1 have extra copies?

2 UNIDENTIFIED SPEAKER: We do.

3 MR. BERNICK: Thank you.

4 UNIDENTIFIED SPEAKER: Thank you.

5 Q Could you identify for the record, Mr. Hughes, what
6 Fireman's Fund Exhibit 2 is?

7 A It is the supersedeas bond in the Aaron Clifton Edwards
8 vs. Pittsburgh Corning and Grace case.

9 Q Could you identify for the record what Fireman's Fund
10 Exhibit 3 is?

11 A It's the specialty surety indemnity agreement between
12 Fireman's Fund and Grace.

13 MR. BERNICK: We offer both of the exhibits.

14 MR. PLEVIN: No objection, Your Honor. This is part
15 of the stipulation that was filed with the Court at Docket
16 Number 23195. I was going to move these documents myself at a
17 later time.

18 THE COURT: All right. They're admitted.

19 MR. BERNICK: Okay.

20 Q Now, this is a bond. It's signed in favor of the Edwards
21 claimants?

22 A Yes.

23 Q Okay. And if we take a look at the bottom of the first
24 page of Exhibit 2, do we see where the following language
25 appears? "Now, therefore, we, Grace, as principal, and

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1 Fireman's Fund Insurance Company, the surety, acknowledge
2 ourselves bound to pay to the plaintiffs -- the plaintiffs the
3 sum of 43 million," et cetera, "conditioned that the surety on
4 this bond is bound to pay all damages and costs that may be
5 awarded up -- against Grace up to the amount of this bond if,"
6 and then it goes on to list two conditions.

7 A Yes.

8 Q Based upon -- does that document -- as you understand that
9 document, does this bear upon your testimony that Fireman's
10 Fund under those circumstances is stepping into the shoes of
11 Grace?

12 MR. PLEVIN: Your Honor, objection. Calls for a
13 legal conclusion, and I would also make the objection that Mr.
14 Hughes' understanding what his interpretation of the bond is
15 irrelevant to the obligations of the parties and the rights of
16 other people under the bond.

17 MR. BERNICK: If Your Honor --

18 MR. PLEVIN: And I would also add that there's no
19 foundation that he was involved in the negotiation of the bond
20 or that he was part of the group. He testified, in fact, the
21 Treasury Department handled it.

22 THE COURT: That's sustained.

23 MR. BERNICK: Well, Your Honor -- well --

24 Q Do you recall that Mr. Plevin asked you for your
25 understanding about the -- about the similarities and

1 differences between BNSF and Fireman's Fund?

2 A Yes.

3 Q And based solely upon the understanding that you had when
4 you asked -- answered Mr. Plevin's questions, is there a
5 difference in your mind between the fact that BNSF is a direct
6 defendant -- as a -- in a plaintiff's lawsuit involving
7 personal injury does Fireman's Fund -- by virtue of this
8 agreement does Fireman's Fund now occupy the position where it
9 is responsible for the liability that's being asserted in tort?

10 MR. PLEVIN: Objection. Relevance. Calls for a
11 legal conclusion.

12 MR. BERNICK: Well, they're relevant --

13 MR. PHILLIPS: Same --

14 MR. BERNICK: The relevance objection is -- already
15 been undercut by the fact that the only reason I'm pursuing
16 this is it was pursued by Mr. Plevin, so he can't have it both
17 ways. He can't open the door to precisely this comparison
18 through this witness and then insist that the witness isn't
19 qualified or isn't competent to draw the differences between
20 the same comparison. That's all that I'm doing, is I'm drawing
21 the differences out through this testimony by the witnesses on
22 a redirect examination, because he opened the door.

23 MR. PHILLIPS: Same --

24 MR. BERNICK: He can't have it both ways.

25 MR. PHILLIPS: Same objection, Your Honor. It's a

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1 legal conclusion, and if we're only asking about his
2 understanding, that's irrelevant.

3 THE COURT: Okay. Well, we've been asking this and
4 every other witness about their understanding through the
5 course of the trial. So I don't know what's changed about the
6 relevance between the other witnesses and this and anything
7 else. In terms of calling for a legal conclusion, it still is,
8 so the objection is sustained.

9 Q Let me ask you something else. Mr. Plevin asked you
10 questions about Grace's -- about whether Grace's conduct in
11 some fashion -- or the Fireman's Fund conduct -- I'm sorry --
12 was at issue in the same way that Grace's conduct was at issue.
13 Remember that?

14 A Yes.

15 Q Well, what -- let me ask you about a certain feature of
16 Fireman's Fund's conduct. At the time that Fireman's Fund
17 entered into this relationship with Grace, at that time was it
18 already known -- did they know that they were stepping into a
19 relationship that involved a tort claim against Grace?

20 MR. PLEVIN: Objection. Lack of foundation. How
21 does he know what Fireman's Fund knew.

22 Q Well, based upon --

23 THE COURT: Sustained.

24 Q Based upon your knowledge of the timing of this
25 relationship, that is the timing of the Fireman's Fund/Grace

1 relationship, was the fact of the Edwards judgment known?

2 A Yes.

3 MR. PLEVIN: Objection. Lack of foundation.

4 Q Is the fact of the Edwards judgment being known, is that
5 stated --

6 MR. PLEVIN: Your Honor, I'm --

7 THE COURT: Wait a second. Wait. I'm sorry. With
8 respect to the lack of foundation, the witness clearly knew
9 about the Edwards judgment. He's testified about it. How he
10 knows whether Fireman's Fund knows, I don't have a foundation
11 for --

12 MR. BERNICK: That's why --

13 THE COURT: -- so that is sustained.

14 MR. BERNICK: That's why we're going to go back to
15 this document.

16 Q If we take a look at the supersedeas bond, is this bond a
17 bond or financial relationship that is general, not specific,
18 to any kind of underlying obligation?

19 A No, it's specific to Grace's obligation to the tort
20 claimants in -- the Edwards tort claimants and the Edwards
21 judgment claimants.

22 Q And on the face of this document is this a situation where
23 Fireman's Fund eyes wide open was becoming involved in a tort
24 relationship?

25 MR. PLEVIN: Objection to the form of the question.

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1 THE COURT: Sustained.

2 Q Let's talk about National Union. With National Union,
3 same basic configuration I want to ask you about. What was the
4 underlying tort claim in National Union?

5 A The asbestos personal injury claims of the clients of
6 Reaud, Morgan & Quinn and Environmental Litigation Group.

7 Q So the clients of Reaud, Morgan & Quinn and the
8 Environmental Litigation Group are suing Grace tort claims?

9 A Yes.

10 Q And at the time of the entry of Grace into the
11 relationship with National Union, what was the status of those
12 tort claims?

13 A Could you repeat the question? I'm sorry.

14 Q At the time that Grace entered into a relationship with
15 National Union, what was the status of the tort claims?

16 A The cases had been settled.

17 Q Factually -- factually what was your understanding of the
18 relationship that National Union entered into -- the agreement
19 that National Union entered into with Grace with respect to the
20 settlement of those tort claims?

21 A National Union agreed if for any reason that Grace was
22 unable to meet its obligations to the tort claimants, that it
23 would make the payments.

24 Q That surety relationship again?

25 A Yes.

1 MR. BERNICK: No further questions.

2 THE COURT: Anyone on recross?

3 MR. PLEVIN: No questions, Your Honor.

4 THE COURT: All right. You're excused, Mr. Hughes.

5 Thank you.

6 THE WITNESS: Thank you.

7 MR. BERNICK: At this point we would call -- recall
8 Mr. Finke to the stand for any further cross examination. And
9 I know we worked very hard to resolve a lot of things. I would
10 suggest though that as we go forward here, based upon what just
11 happened with Longacre, we really believe that it would be an
12 unnecessary consumption of time, particularly in light of --
13 well, an unnecessary consumption of time to have everybody come
14 up with their particular documents and offer them into evidence
15 pursuant to stipulation or argue about the relevance of
16 documents that have not been stipulated to, and I'm concerned
17 about that, because that really was the substance of the
18 discussions that took place last night.

19 THE COURT: As long as this witness is not the
20 witness through whom some authentication or whatever else
21 that's objected to has to take place, then that issue can be
22 deferred until after Dr. Peterson testifies.

23 MR. BERNICK: Correct.

24 THE COURT: But if this witness is necessary for some
25 link in the evidentiary chain, then it'll have to be done

1 through this witness.

2 MR. BERNICK: I -- that's fair, and we are prepared
3 later on this afternoon, and I don't even know if folks have to
4 be -- you know, we are prepared later on this afternoon to
5 simply take a few minutes and just put all these documents into
6 evidence without dictating in detail what they are and -- that
7 would be our proposal, Your Honor.

8 THE COURT: Mr. Brown. Mr. Finke, you're still under
9 oath, sir.

10 MR. BROWN: Good morning, Your Honor. We worked last
11 night and did come up with a stipulation, and the purpose of
12 the stipulation is to dispense with the need to go further with
13 the cross examination or examination of Mr. Finke. The
14 stipulation sets forth the documents that are to be admitted
15 into evidence as well as the terms pursuant to which they're
16 admitted into evidence, because some of them are not being
17 admitted for the truth of the matter asserted.

18 What might be the easiest way to do this, so that we
19 can release Mr. Finke, is for me simply to go down the list of
20 exhibits that have been stipulated to, the admissibility, and
21 then simply to say that those documents are admitted subject to
22 the terms of the stipulation, which we'll then file with the
23 Court.

24 THE COURT: All right.

25 MR. BROWN: Plan Proponents' 243, OS-46, OS-50, OS-

1 51, OS-15, OS-28, OS-40, OS-41, OS-44, OS-14, OS-16, OS-17, OS-
2 18, OS-48 --

3 THE COURT: Wait. I'm sorry. OS-48. Okay.

4 MR. BROWN: 48, OS-49, OS-19, OS-20, OS-27 revised,
5 GR-14 revised --

6 THE COURT: Wait. Pardon me one second. I'm sorry.
7 GS what?

8 MR. BROWN: GR-14 --

9 THE COURT: GR.

10 MR. BROWN: -- revised.

11 THE COURT: All right.

12 MR. BROWN: GR-15 revised, GR-16 revised, GR-17
13 revised, GR-18 revised, GR-19 revised, GR-20 revised. And
14 that's the complete list, Your Honor.

15 THE COURT: All right. Let me just repeat them
16 quickly. Plan Proponents' 243, OS-46, 50, 51, 15, 28, 40, 41,
17 44, 14, 16, 17, 18, 48, 49, 19, 20, and 27 revised, GR-14
18 revised, 15 revised, 16 revised, 17 revised, 18 revised, 19
19 revised, and 20 revised.

20 MR. BROWN: That's correct.

21 THE COURT: Okay. One second.

22 (Pause)

23 THE COURT: Okay. Thank you. They're all admitted
24 subject to the terms of the stipulation.

25 MR. BROWN: Okay. And, Your Honor, we'll have copies

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1 of this made over the lunch break and provide Your Honor with a
2 copy and copies for all the other parties.

3 THE COURT: All right. Thank you. Anyone else,
4 questions for Mr. Finke? Mr. Bernick, do you have questions
5 for Mr. Finke?

6 MR. BERNICK: No, we don't.

7 THE COURT: You're excused, Mr. Finke. Thank you.
8 That was --

9 MR. BERNICK: Boy, I tell you we're cooking now. I
10 think our next witness is going to be Dr. Peterson. Well,
11 actually, no, it's Mr. Shelnitz on the corporate stuff. So I
12 -- and I think we can probably do this -- it might be actually
13 appropriate to take a short break, but it's up to you, Your
14 Honor.

15 THE COURT: All right. We'll take a ten-minute
16 recess.

17 (Recess)

18 THE COURT: Please be seated. Mr. Bernick.

19 MR. BERNICK: Yes, we call Mark Shelnitz to the
20 stand.

21 THE CLERK: Raise your right hand, please.

22 MARK SHELNITZ, PLAN PROPONENTS' WITNESS, SWORN

23 THE CLERK: Please be seated.

24 MR. BERNICK: Good morning, Mr. Shelnitz.

25 DIRECT EXAMINATION

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1 BY MR. BERNICK:

2 Q Could you please tell the Court what your position at W.R.
3 Grace is?

4 A I am Vice President and General Counsel and Secretary.

5 Q And how long have you held that position?

6 A I've held the Secretary position since 1999 and the Vice
7 President and General Counsel position since 2005.

8 Q Okay. Could you just give the Court a brief overview of
9 your educational background and your career prior to getting
10 the position that you now hold?

11 A My undergraduate degree was from the Wharton School at the
12 University of Pennsylvania, then I went on to New York
13 University School of Law for my J.D. After a summer position
14 at a law firm, I joined Grace directly out of law school, have
15 been there almost 26 years. My positions have evolved from
16 corporate and commercial work to transactional work, joint
17 ventures, acquisitions and divestitures and restructuring, and
18 later in my career I took over roles in management of other
19 lawyers in the department. In 1998 I became Assistant General
20 Counsel and moved on from there to my current position.

21 Q In your role as General -- strike that. In your role at
22 -- in house at W.R. Grace did you have direct involvement in
23 the Sealed Air transaction?

24 A Yes.

25 Q During the course of your work on the Sealed Air

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1 transaction, tell us whether or not it was part and parcel of
2 your ordinary duties also to become familiar with,
3 knowledgeable about the Fresenius transaction that had taken
4 place earlier.

5 A Yes.

6 Q Based upon your experience with those different
7 transactions, have you -- in anticipation of your appearance
8 here today, have you also gone back over to refresh your
9 recollection using the associated documents your recollection
10 of the structures that were used in connection with those
11 transactions? That is how those transactions were structured.

12 A Yes.

13 Q And are you prepared here today to talk about the
14 relationship between the part of Grace that has the underlying
15 asbestos liabilities, on the one hand, and the entities at
16 Grace that subsequently merged with Sealed Air entities and
17 Fresenius entities?

18 A Yes.

19 MR. PRATT: Objection, Your Honor.

20 Q -- and the relationship between the two?

21 A Yes.

22 MR. PRATT: Objection, Your Honor. Could we have a
23 proffer of relevance for the record, please?

24 MR. BERNICK: Yes, 524(g) provides that there can be
25 a channeling injunction protection with respect to parents of

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1 the entity that is the tortfeasor, and we will be establishing
2 through this testimony that Fresenius and Sealed Air, to the
3 extent that they're being sued in underlying tort cases, are
4 being sued by virtue of their former capacity as being parents
5 of the W.R. Grace company that as a subsidiary was alleged to
6 be the tortfeasor. So it relates to 524(g).

7 THE COURT: All right.

8 Q There are a series of slides, Mr. Shelnitz, that we
9 prepared that will help walk the Court through these -- the
10 various steps of the transactions that were involved in
11 Fresenius and Sealed Air. There are a series of slides --

12 A Yes.

13 Q -- that we have. We have a slide show this morning.

14 A Okay. Should I be looking in my book here for them?

15 Q I hope that they are. If they're not, we're all in
16 trouble.

17 MR. PLATT: Your Honor, I have an objection to the
18 slides just as a foundational matter.

19 THE COURT: All right.

20 MR. BERNICK: Well, what's the objection?

21 THE COURT: He needs to use the microphone.

22 MR. PLATT: Your Honor, I think foundation needs to
23 be laid for these slides, because -- and this is the premise
24 for my objection. The premise is that a lawyer on direct
25 examination of his own witness cannot ask leading questions

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1 about important matters over objections. Now, the slides, as
2 Mr. Bernick just said, are to walk the Court through, and I
3 just want to use my own demonstrative to demonstrate -- to
4 illustrate, really, my objection.

5 THE COURT: Kathy, can you turn the system on?

6 MR. BERNICK: Look at that.

7 MR. PRATT: Now, if that's my demonstrative --

8 THE COURT: I can't, because the system isn't on yet.

9 MR. BERNICK: Well, you're really missing something.

10 (Laughter)

11 MR. BERNICK: You know, I work so hard --

12 THE COURT: I think even I could draw that one.

13 MR. PRATT: Well, you know, I --

14 MR. BERNICK: My client's paying so much money for me
15 to do this --

16 MR. PRATT: I dare not --

17 MR. BERNICK: -- and I -- obviously, I just don't
18 know what's going on.

19 MR. PRATT: Well, mine aren't as slick as yours, but
20 I dared not try to draw a mountain, Your Honor, so this is what
21 I've got. Now, if I'm going to use this demonstrative on
22 direct examination of my own witness, what I'm going to try to
23 do is ask a non-leading question on direct, and I think that
24 will illustrate the problem. Mr. Witness, what color was the
25 traffic light when the accident occurred? So you see the

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1 problem, Your Honor? There needs to be a foundation as to
2 these demonstratives that the witness either prepared them --

3 MR. BERNICK: I can't --

4 MR. PRATT: -- or knows about them before Mr.
5 Bernick uses those demonstratives to lead the witness through
6 his direct examination.

7 THE COURT: All right. That's the same objection we
8 had before. I think Mr. Bernick can lay the foundation before
9 the document is actually displayed.

10 MR. BERNICK: This is really going to be
11 extraordinarily inefficient, but I'll try.

12 BY MR. BERNICK:

13 Q First of all, let me just ask you, Mr. Shelnitz, these
14 different slides that we have here -- these different slides
15 that we have here, have you ascertained whether or not they
16 are, in fact, a reflection of the underlying corporate
17 documents?

18 A Yes.

19 Q Okay, and do they accurately portray the underlying
20 corporate documents?

21 A I believe so.

22 Q Now, I didn't realize this morning that Mr. Pratt, I
23 believe it was, was going to zero in on Green. Would these
24 slides be any different if we did them all in red?

25 (Laughter)

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1 A I'll take that as a rhetorical question.

2 Q Okay. Let's begin before 1988, the world before 1988.

3 What was the main operating entity of W.R. Grace? What was its
4 name?

5 A W.R. Grace and Co.

6 Q Okay, and with respect to W.R. Grace and Co. tell us what,
7 if any, relationship there was between that operating entity
8 and the businesses that gave rise to the claims of asbestos
9 liability.

10 A That operating entity operated the asset ownership -- most
11 of the businesses of W.R. Grace as a consolidated group. In
12 particular, it operated the construction products division.
13 The construction products division produced products that gave
14 rise to Grace's asbestos-related liability.

15 Q Was there an entity named National Medical Care, Inc.
16 before 1988 that had a relationship with W.R. Grace and Co.?

17 A Yes.

18 Q And what was the business and what was the nature of the
19 relationship with W.R. Grace and Co.?

20 A National Medical Care, Inc. was a wholly-owned subsidiary
21 of W.R. Grace and Co. It was acquired probably around 1984.
22 It was engaged in the medical care service business,
23 principally kidney dialysis.

24 Q Okay. Showing you Exhibit -- do you have Exhibit 507-1?
25 I can put it on the screen. Tell me whether or not this

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1 accurately reflects the testimony that you offered regarding
2 the pre-1988 status of those two entities.

3 A That is an accurate reflection of those two entities. I
4 will remark that W.R. Grace and Co. also owned several other
5 businesses that are not reflected there, but they're not
6 relevant to subsequent transactions.

7 Q Did the time come in 1988 when there was a reorganization
8 affecting W.R. Grace?

9 A Yes.

10 MR. PRATT: Objection, Your Honor. The term, as
11 you'll see from these slides -- the term W.R. Grace has a lot
12 of antecedents, and I think it would be helpful if Mr. Bernick
13 and the witness referred to this one by the name W.R. Grace and
14 Co., a Connecticut corporation, if that's correct.

15 MR. BERNICK: Well, now that I can't show the slide
16 or use the slide until I ask the questions, I'm not sure how
17 it's appropriate that I be given guidance if we're going to use
18 the demonstrative on how to ask the questions. I'll try to
19 accommodate Mr. Pratt's concern about precision.

20 Q Was there or was there not a reorganization that took
21 place in 1988?

22 A Yes.

23 Q And could you tell the Court what happened in that
24 reorganization? And please be sure if there is a specific name
25 of a specific company that you recall, to state clearly for Mr.

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1 Pratt and the Court's benefit what that name is.

2 A Through a series of formation and a merger transaction,
3 W.R. Grace and Co., a Connecticut corporation then existing at
4 the time, was converted into a holding company structure
5 whereby after those transactions a new company, formerly known
6 as W.R. Grace and Co.-New York, that subsequently renamed W.R.
7 Grace and Co., stood atop the W.R. Grace and Co. Connecticut
8 corporation.

9 Q Okay. Which company, as a result of that reorganization,
10 actually held the underlying construction business and with it
11 the associated liabilities?

12 A The Connecticut corporation, formerly named W.R. Grace and
13 Co., which was renamed W.R. Grace and Co.-Conn, hence the
14 Connecticut corporation to be distinguished from the new parent
15 company, the New York corporation.

16 Q You just answered the next question, but following that
17 reorganization, what was the relationship of the new W.R. Grace
18 and Co. to the entity that had the underlying tort liabilities?

19 A It was the parent corporation.

20 Q Thank you. I'm showing you 507-2. Could you tell us
21 whether or not that accurately reflects the substance of the
22 1988 reorganization?

23 A It does.

24 Q Let's now turn to a further change in connection with the
25 Fresenius transaction. Between the time of the 1988

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1 reorganization and the Fresenius transaction, did -- was there
2 a free -- a further organizational change that took place?

3 A Yes.

4 Q Could you tell the Court what the further organizational
5 change was that took place?

6 A There were a few different transactions that took place in
7 preparation for the Fresenius transaction, one of which was for
8 the holding company, W.R. Grace and Co., the New York
9 corporation, to form a new subsidiary named Grace Holdings,
10 Inc. A second step preceding the Fresenius transaction was to
11 move National Medical Care, then a subsidiary directly held by
12 W.R. Grace and Co.-Conn., to move it directly under the holding
13 company W.R. Grace and Co.

14 Q Showing you demonstrative -- Plaintiff's Demonstrative
15 507-3. Does that or does it not accurately reflect the changes
16 that you've now just described?

17 A It does.

18 Q Let's talk about the Fresenius transaction. Would it be
19 best to look at the Fresenius transaction in a couple different
20 parts?

21 A Yes.

22 Q Now we're going to get very tricky. This is hard to
23 recall, but could you tell the Court in your own words what the
24 different transactional steps were that were involved in the
25 process of completing the Fresenius transaction?

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1 A Okay. The Fresenius transaction basically separated
2 Grace's medical care business, National Medical Care, from its
3 chemical and all other businesses held by W.R. Grace and Co.-
4 Conn. and other subsidiaries. The way the transactions -- the
5 way the companies were separated was that Grace Holdings, Inc.,
6 that newly formed subsidiary, became the parent -- directly
7 held parent company of W.R. Grace and Co.-Conn. And that was
8 -- that was consummated basically via contribution by W.R.
9 Grace and Co., the New York corporation, of the stock of Grace-
10 Conn. to Grace Holdings. So now we have a structure where W.R.
11 Grace and Co.-Conn. is directly held by Grace Holdings.

12 Q Okay.

13 A The ultimate parent, W.R. Grace and Co., the New York
14 corporation, then spun off to the public shareholders shares of
15 Grace Holdings, Inc. So the public shareholders at that point
16 in time owned 100 percent of Grace Holdings, Inc., which again
17 held W.R. Grace and Co.-Conn. and the construction-related
18 businesses, and continued to own W.R. Grace and Co., the New
19 York corporation, which now had just the medical care business
20 as a wholly-owned subsidiary. That's what I would call the
21 first step in the -- in a two-part transaction.

22 Q And does Exhibit 507-4 as a demonstrative accurately
23 reflect the basic moves that you've now just described?

24 A Yes, it does.

25 Q Now, again, before we lose track of Parent 1, is Parent 1

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1 the company that used to be the direct parent of W.R. Grace,
2 that is the New York company?

3 A Correct, the company formed in the 1998 reorganization.

4 Q Okay, so the relationship of Parent 1 to the company with
5 the liabilities, parent sub?

6 A Yes.

7 Q And that parent now is moving up and really becoming
8 separate from the new parent, Parent 2, Grace Holdings?

9 A That's correct. Once Grace Holdings was spun off to the
10 public, Parent 1 no longer had an ownership interest, direct or
11 indirect, in W.R. Grace and Co.-Conn.

12 Q But it was taking --

13 MR. LOCKWOOD: Wait a minute, Mr. Bernick. The
14 witness said that he --

15 THE CLERK: You need to use a mic.

16 MR. LOCKWOOD: The witness testified that the New
17 York company was formed in the 1998 reorganization.

18 THE WITNESS: I said '88.

19 THE COURT: 1988.

20 MR. LOCKWOOD: Thank you.

21 MR. BERNICK: You've got to keep track here, Pete.

22 MR. LOCKWOOD: It's on the screen. I heard it and
23 the Court reporter heard it as 1998.

24 THE COURT: I heard it as 1988. What's correct, sir?

25 THE WITNESS: 1988.

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1 Q Once that took place was the parent -- when parent
2 contributed the stock to the new parent, Parent 1, the New York
3 corporation, separate but did it take along with it the NMC
4 subsidiary?

5 A Yes.

6 THE COURT: I'm sorry. I missed the question. Would
7 you state it again?

8 MR. BERNICK: Yes, I'll restate it.

9 Q Once the parent contributed its stock -- Parent 1, New
10 York, contributed its stock in the operating company, Grace-
11 Conn., to what used to be Grace Holdings and now is going to
12 become Parent 2, I think you've told us that Parent 1 is now
13 detached from the Grace organization?

14 A Correct.

15 Q But it carries with it the medical products business.

16 A Correct.

17 Q Now what role, if any, did that Parent 2, the former
18 direct parent of the operating company -- what role, if any,
19 did Parent 2 go on to play in connection with the Fresenius
20 transaction?

21 A Well, Parent 2 --

22 Q I'm sorry. Parent 1. What role -- I was pointing at
23 Parent 1 --

24 A Okay. Parent 1.

25 Q -- and I said Parent 2. What role, if any, did Parent 1

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1 go on to play in the Fresenius transaction?

2 A Well, Parent 1 merged with a subsidiary of Fresenius A.G.
3 Fresenius A.G. was a German holding company publicly traded on
4 the Frankfurt Exchange. It had a number of different
5 subsidiaries, including U.S. subsidiaries. It merged with one
6 of the U.S. subsidiaries. Parent 1, W.R. Grace and Co., the
7 New York corporation, was the surviving corporation in the
8 merger, and following that transaction the combined
9 corporation, Parent 1 and Fresenius' subsidiary, continued to
10 own and operate National Medical Care.

11 Q I'm showing you 507-5. Does that accurately reflect the
12 transactions and events that you've just now described?

13 A In summary fashion, yes.

14 Q Okay. Let's talk about the Sealed Air transaction. Prior
15 to the Sealed Air transaction, we now have, just to review the
16 bidding -- prior to the Sealed Air transaction we have the
17 operating company is still W.R. Grace and Company, a
18 Connecticut corporation, and that still has the asbestos
19 liabilities?

20 A Yes.

21 Q And the new parent, Parent 2, is what used to be Grace
22 Holdings but now is called W.R. Grace and Company?

23 A Correct, it changed its name.

24 Q Okay. What further changes, if any, took place before the
25 Sealed Air transaction was executed?

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1 A Again, similar to the Fresenius transaction structure, in
2 order to prepare for the Sealed Air transaction, Parent 2, the
3 new holding company, W.R. Grace and Co., now a Delaware
4 corporation, formed a new co and was named Grace Specialty
5 Chemicals, Inc. At the same time, in order to do the Sealed
6 Air transaction, Grace needed to separate its packaging
7 business from its chemicals business, and the packaging
8 business was in the U.S. unincorporated. Its assets were held
9 directly by W.R. Grace and Co.-Conn. So those packaging assets
10 were pushed down into a subsidiary named Cryovac, Inc., and it
11 became a separate subsidiary initially held directly by W.R.
12 Grace and Co.-Conn. Similar to the NMC/Fresenius transaction,
13 W.R. Grace and Co.-Conn. then transferred the shares of
14 Cryovac, Inc. to Parent 2, so it was, therefore, held directly
15 by Parent 2, directly by the holding company, W.R. Grace and
16 Co. So those were the steps -- there were many others, but
17 those were the primary steps that were taken as a prelude to
18 the Sealed Air transaction.

19 Q I'm showing you Exhibit 507-6. Does that accurately
20 reflect what you've just described?

21 A Yes.

22 Q Now, at this point in time the asbestos liabilities and
23 the former business -- the construction business still held by
24 the operating company, Grace-Conn.?

25 A Correct.

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1 Q And what was the relationship between the new W.R. Grace,
2 which we've called Parent 2, and the entity that had the
3 asbestos liabilities?

4 A Parent 2 held the shares of W.R. Grace and Co.-Conn.

5 Q So parent sub?

6 A Parent sub.

7 Q Okay. Now, tell us what the steps were of the Sealed Air
8 transaction, and again, would it be useful to describe them in
9 two parts?

10 A Yes.

11 Q Just take us through the first part.

12 A The first part had Parent 2 contributing its ownership
13 interest -- the shares of Grace-Conn. to Grace Specialty
14 Chemicals, Inc. The result of which was that Grace-Conn. now
15 became a directly held subsidiary of Grace Specialty Chemicals,
16 Inc.

17 Q Is that parallel to pretty much the same as what happened
18 with Grace Holdings in connection with the Fresenius
19 transaction?

20 A Yes.

21 Q Okay.

22 A Grace Specialty Chemicals, Inc. was then spun off to the
23 shareholders -- the public shareholders of Parent 2, what
24 became a standalone publicly held corporation divorced of
25 Parent 2. That would be the first step of the Sealed Air

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1 transaction to separate chemicals and packaging.

2 Q Does 507-7 now accurately reflect the transaction that
3 you've described?

4 A Yes.

5 Q Now, in this transaction Parent 2 is the same parent that
6 in 507-6 was the parent that was the direct parent of the
7 operating company that had the asbestos liabilities?

8 A Correct.

9 Q Did Parent 2 in 507-7 go on to participate further in the
10 Sealed Air transaction?

11 A Yes, it did.

12 Q And could you describe what happened?

13 A In that transaction Parent 2, W.R. Grace and Co., the
14 Delaware corporation, merged with Sealed Air Corporation, a
15 publicly traded U.S. corporation that had a protective
16 packaging business. Parent 2 was the surviving corporation in
17 that transaction, and the merged entity had as a wholly-owned
18 subsidiary the Cryovac, Inc. packaging business.

19 Q Okay. Is that now accurately reflected in Exhibit 507-8?

20 A Yes.

21 Q What's the current relationship -- what's the current
22 parent subsidiary relationship between W.R. Grace and Co. and
23 the operating business?

24 A It -- the operating business is a wholly-owned subsidiary
25 of the new W.R. Grace and Co. That was Grace Specialty

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1 Chemicals, Inc., which after the spinoff changed its name to
2 W.R. Grace and Co., and I guess you can call it Parent 3.

3 Q Okay. Does Exhibit 507-9 accurately reflect that
4 relationship?

5 A Yes.

6 MR. BERNICK: Your Honor, we offer for demonstrative
7 purposes --

8 THE COURT: Wait. I'm sorry. Before you do that, I
9 lost this last transaction. I don't know which W.R. Grace
10 we're talking about in the 507-9 I think.

11 Q Yes, 507-9 -- I think if we go back to 507-7 --

12 THE COURT: All right.

13 Q -- is it accurate that in 507-7 Grace Specialty Chemicals
14 becomes the new parent of the operating company, and the old
15 parent, Parent 2, goes off on its way separately to participate
16 in the Fresenius transaction --

17 A Sealed Air.

18 Q -- Sealed Air transaction reflected in 507-8.

19 A That's correct.

20 Q So if we go back to 507-7, Parent 3 is the new parent that
21 was put in place through a contribution of stock to the
22 operating company prior to the Sealed Air transaction?

23 A Yes.

24 Q Is that now still the parent company today as Parent 3 is
25 reflected in 507-9?

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1 A Yes, Grace Specialty Chemicals, Inc. changed its name to
2 W.R. Grace and Co. At the same time the old W.R. Grace and
3 Co., which we've been calling Parent 2, changed its name to
4 Sealed Air Corporation.

5 MR. BERNICK: Is that okay, Your Honor?

6 THE COURT: Yes.

7 MR. BERNICK: Thank you. We would offer for
8 demonstrative purposes 507-1 through 507-9.

9 MR. PRATT: Objection, Your Honor. Mr. Shelnitz
10 testified that these are accurate. Actually, I think he will
11 agree with me on cross examination that they're not entirely
12 proper.

13 THE COURT: I'm having trouble hearing you, Mr.
14 Pratt. I'm sorry. I think that microphone's being used for
15 the Lavalier mic, so that one microphone on the end isn't live.

16 MR. PRATT: Your Honor, I'd prefer if the Court would
17 delay ruling. The witness testified that these demonstratives
18 are accurate, but they're not quite accurate, and I'm going to
19 bring that out on cross. So before they're admitted, I'd like
20 to bring that out. Maybe they can be corrected, but I'd like
21 the Court to defer ruling on whether they're admissible even as
22 demonstratives at this point.

23 MR. BERNICK: They're not being proffered as a
24 stipulated set of demonstratives. They're being proffered as
25 demonstratives that would aid the Court in understanding Mr.

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1 Shelnitz's testimony, and they should come in for that purpose.
2 It's relatively unusual to have a demonstrative as to which
3 everybody agrees its accuracy, so that goes to the weight. It
4 doesn't go to admissibility.

5 THE COURT: I think it does go to the weight, Mr.
6 Pratt, but you can certainly ask questions about them on cross,
7 and then if it turns out that they're inaccurate, then I will
8 take them back out of the record. But I think as
9 demonstratives for this witness' testimony right now, they're
10 admissible for that limited purpose. One second, please.

11 (Pause)

12 THE COURT: All right, Mr. Bernick. Thank you.

13 Q I have some general questions to ask you based upon what
14 you just now testified. At any point in time did any Grace
15 entity hold the asbestos liabilities other than the operating
16 entity?

17 A No.

18 Q At all points in time what was the relationship between
19 that operating entity -- that operating entity that had the
20 liabilities and the entity that went on to participate in the
21 mergers with first Fresenius and then with Sealed Air -- what
22 was the relationship between the operating entity with the
23 liabilities and the entity that respectively went off to do
24 Fresenius and respectively went off to do Sealed Air?

25 A It was a parent subsidiary structure, directly held

1 subsidiary.

2 Q Were there -- in connection with these transactions, were
3 there indemnities that were given to first Sealed -- first
4 Fresenius and then Sealed Air?

5 A Yes, very expensive indemnities.

6 Q With respect to the Fresenius transaction, did those
7 indemnities cover liabilities -- those liabilities other than
8 those arising from the medical care business?

9 A That would be correct.

10 Q And with respect to Sealed Air, did Grace give indemnities
11 to Sealed Air that covered liabilities -- all liabilities other
12 than those arising from the packaging business?

13 A Yes.

14 Q Since the transaction was consummated first with Sealed
15 Air and then -- first with Fresenius and then with Sealed Air,
16 have lawsuits, in fact, been filed against Fresenius and Sealed
17 Air arising out of the asbestos business of Grace's operating
18 company?

19 A Yes.

20 Q I want to show you Exhibits 121, 120 -- who's OS? Oh,
21 OneBeacon 20, 129 -- Proponents' 129 and Proponents' 143. They
22 should all be in the book in front of you, and I'm just going
23 to take you through them and then offer them into evidence.

24 A Okay.

25 Q In fact, since the -- both shortly before and since the

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1 bankruptcy petition have been filed, have lawsuits been brought
2 by tort claimants against both of the entities?

3 A Yes.

4 Q And do these documents reflect the existence of these
5 lawsuits?

6 A Yes.

7 Q Okay. Taking you through first 121 -- Plan Proponents'
8 121, is this a copy of a class action complaint that was filed
9 against both Grace and Sealed Air arising out of Grace's
10 asbestos-related activities?

11 A Yes.

12 Q Taking you to Plan Proponents' --

13 THE COURT: I'm sorry. 121. The question was
14 whether it's against both Sealed Air and --

15 MR. BERNICK: Grace.

16 THE COURT: Oh, Grace.

17 MR. BERNICK: W.R. Grace and Company, a Delaware
18 corporation, and Conn, the operating --

19 THE COURT: All right.

20 MR. BERNICK: -- the operating company arising out of
21 Grace's asbestos-related activities.

22 THE COURT: Okay. Thank you.

23 Q And then taking you to Plan Proponents' 120, is this also
24 a lawsuit against both Grace Delaware, Grace Conn, and Sealed
25 Air once again arising out of Grace's activities that related

1 in part to asbestos?

2 A Yes.

3 Q OS-20, is this a copy of the proof of claim of the Sealed
4 Air Corporation in this case?

5 A Yes, it is.

6 Q Plan Proponents' 129, is this a copy of a different
7 lawsuit that was filed shortly before the Chapter 11 that was
8 brought against Grace, various entities, and then also Sealed
9 Air and Fresenius arising out of Grace's historical asbestos-
10 related activities?

11 A Yes.

12 Q And finally, Plan Proponents' 143, is this an addendum to
13 the proof of claim of Fresenius in connection with this case?

14 A Yes, it is.

15 MR. BERNICK: Your Honor, we offer all of these
16 exhibits for the fact that the litigation was being pursued
17 prior to the bankruptcy petition by claimants against -- the
18 tort claimants against Sealed Air and Fresenius. That those --
19 and that those suits continued after the bankruptcy was filed,
20 and the Court will know from the record before the stay was
21 instituted and are the subject of claims that are now being
22 made by Sealed Air and Fresenius in the bankruptcy. So it's
23 for the fact of the -- that litigation and those claims in the
24 bankruptcy not for the truth of the matters that are asserted.

25 MR. LOCKWOOD: Mr. Bernick, one question. Do you

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1 include Exhibit 126 when you say all these exhibits, which you
2 did not show to the witness or do you mean to exclude Exhibit
3 126?

4 THE COURT: Your microphone is not on, Mr. Lockwood.

5 MR. LOCKWOOD: Exhibit 126. I'm sorry. I wasn't
6 talking into it.

7 MR. BERNICK: I didn't see Exhibit 126.

8 MR. LOCKWOOD: What?

9 MR. BERNICK: What are you --

10 MR. LOCKWOOD: It's Tab 2.

11 MR. BERNICK: Yes, I didn't -- we don't need Tab 2.

12 THE COURT: Mr. Pratt.

13 MR. PRATT: No objection, Your Honor.

14 THE COURT: All right. Exhibits, Plan Proponent 121,
15 120, 129, and 143 are admitted, and OS-20 is admitted. Give me
16 a second, Mr. Bernick.

17 (Pause)

18 MR. BERNICK: You may have mentioned this, and I just
19 didn't hear. There would be a total of five exhibits, 1 --

20 THE COURT: Yes.

21 MR. BERNICK: Okay.

22 THE COURT: 120 and 21, 129, 143, and OS-20.

23 MR. BERNICK: Yes, that's right. We pass the
24 witness.

25 THE COURT: Mr. Pratt.

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1 MR. PRATT: Good morning, Mr. Shelnitz. Warren Pratt
2 representing creditors OneBeacon and Seaton.

3 THE WITNESS: Good morning.

4 CROSS EXAMINATION

5 BY MR. PRATT:

6 Q I don't -- I didn't -- it didn't register with me when you
7 said when you first started with Grace companies.

8 A 1983.

9 Q 1983. And you're currently Vice President and General
10 Counsel and Secretary?

11 A Correct.

12 Q Of which entity?

13 A W.R. Grace and Co., Parent 3, and W.R. Grace and Co.-Conn.

14 Q And in that capacity you're an officer of those entities?

15 A That's correct.

16 Q Now, at some point in the General Counsel's office -- when
17 you first came to the General Counsel's office, to whom did you
18 report?

19 A In 1983?

20 Q Yes.

21 A I don't recall.

22 Q At some point did you come to report to David Siegel?

23 A Yes.

24 Q And that's your predecessor as General Counsel?

25 A That's correct.

1 Q And what are your present duties, just in a nutshell?

2 A I manage Grace's worldwide legal affairs. I am a Chief
3 Liaison with the Board. I function as Grace's Chief
4 Restructuring Officer in the bankruptcy, do most types of
5 things you would expect a General Counsel to do.

6 Q As General Counsel, do you have occasion to sign
7 declarations that get filed with the court?

8 A Yes.

9 Q Now, I'm going to go back through these slides and take
10 another pass, and I'm going to focus specifically on the names
11 of the -- some of the entities and the timing involved. Okay.
12 This is 507-1, Slide 1. Now, this entity here, W.R. Grace and
13 Co., that was a Connecticut corporation. Correct?

14 A Correct.

15 Q And that corporation was formed in 1899?

16 A I believe that's correct.

17 MR. BERNICK: Your Honor, this -- we're happy to go
18 over and hear corrections, but they should be relevant
19 corrections. The date on which Grace-Conn. was founded is not
20 of relevance.

21 MR. PRATT: Well, it's a matter of history, Your
22 Honor.

23 MR. BERNICK: Well, lots of history. That's great.
24 But can we keep it to something that -- object on relevance
25 grounds.

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1 THE COURT: Okay. That's sustained. Let's move, Mr.
2 Pratt.

3 Q Mr. Shelnitz, I'd like to refer to W.R. Grace and Co., the
4 entity -- the Connecticut corporation that's shown on this page
5 as Old Grace. Have you ever heard that term Old Grace before?

6 A Yes.

7 Q Was this company called Old Grace in 1988 at the time of
8 its incorporation -- or excuse me -- at the time of the
9 reorganization?

10 A I don't recall.

11 Q Okay. Well, let's go to Slide 2.

12 MR. BERNICK: Could we then refer to it as Grace-
13 Conn. if the witness doesn't recall Old Grace?

14 Q Now, see Number 1 up here at the upper right?

15 A Yes.

16 Q This says, "W.R. Grace and Co. reorganized into a holding
17 company, Parent 1." I don't think that's quite precise, but
18 maybe you can tell me which W.R. Grace and Co. is referred to
19 in that Note 1 there.

20 A It was meant to depict a general reorganization of the
21 Grace group, a consolidated Grace entity.

22 Q Okay, so what happened here is that the -- a new company
23 was formed, and that new company is at the very top. Isn't it?

24 A Correct.

25 Q And that's W.R. Grace and Co., a New York corporation.

1 A Correct.

2 Q And that's sometimes called Grace New York. Correct?

3 A Colloquially, yes.

4 Q And you labeled it here Parent 1 or this slide labels it
5 Parent 1. And beneath that W.R. Grace and Co.-Conn., Note 2
6 says the operating company was changed to that name in 1988,
7 correct, to add Conn.

8 A Correct.

9 Q And that reflects it's a Connecticut corporation.

10 A Correct.

11 Q Now, this happened in 1988. Correct?

12 A Correct.

13 Q And this organizational structure continued from 1988 up
14 until the Fresenius transaction closed. Isn't that right?

15 MR. BERNICK: Objection. Your Honor, I -- the cross
16 examination's great, but can we get to some -- I mean this is
17 just going back over exactly the same ground that he gave on
18 direct. If we can get to something that's different, that
19 might be helpful.

20 MR. PRATT: I'm taking it fairly quickly, Your Honor.
21 This shouldn't take too long.

22 THE COURT: All right. Go ahead.

23 MR. PRATT: Thank you.

24 Q Did you remember the question, Mr. Shelnitz?

25 THE COURT: I don't.

1 A I don't either.

2 Q Okay. This diagram, Slide 2 here that we're looking at,
3 this shows the organization of the company, W.R. Grace and its
4 affiliates from 1988, when this reorganization occurred, up
5 until the closing of the Fresenius transaction. Is that right?

6 A Not up until the closing of the Fresenius transaction.

7 That's incorrect. There were interim steps to prepare for the
8 Fresenius transaction. And further, to answer your question,
9 this is not what the entire Grace group looks like. There were
10 other subsidiaries. There were other businesses. But for
11 purposes of understanding the Sealed Air/Fresenius
12 transactions, this would be relevant.

13 Q Okay, and this relevant part didn't change until 1996.
14 Did it?

15 A I think that's correct.

16 Q Okay. Now, Fresenius transaction closed in September of
17 1996. Is that right?

18 A Correct.

19 THE COURT: I'm sorry. When? What was the year?

20 MR. PRATT: September, 1996.

21 THE COURT: All right. Thank you.

22 Q I'm going to skip Number 3, and we'll go to Number 4.
23 Now, this says at the top Fresenius Transaction Part 1. The
24 Fresenius took place in September, 1996. Correct?

25 A Correct.

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1 Q And that was -- the next slide is labeled Fresenius
2 transaction, Part 2. All of -- Part 1 and Part 2 were
3 essentially simultaneous. Weren't they?

4 A I believe that's correct.

5 Q Now, I just want to clarify --

6 THE COURT: Mr. Pratt, just a second. Kathy, did we
7 lose the phone?

8 THE CLERK: Yes, Judge.

9 THE COURT: Okay.

10 THE CLERK: I'll get them back on.

11 THE COURT: Just a second, Mr. Pratt. I'm sorry.

12 (Pause)

13 MR. BERNICK: Are these local astronomical
14 disturbances, Your Honor?

15 THE COURT: The President's coming to town today, and
16 one never knows.

17 MR. BERNICK: That may be plausible.

18 (Pause)

19 THE CLERK: Okay, Judge.

20 THE COURT: Court Call, Operator, are you back live?

21 OPERATOR: Yes, we are back live. Thank you so much.

22 THE COURT: Thank you. Okay, Mr. Pratt. Thank you.

23 MR. PRATT: Thank you, Your Honor.

24 BY MR. PRATT:

25 Q Mr. Shelnitz, we're looking at Slide 4 here, Exhibit 507-

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1 4. What's labeled at the top Parent 1, that's W.R. Grace and
2 Co., a New York corporation. Correct?

3 A Correct.

4 Q And it shows here off to the right Grace Holdings, Inc.
5 That's a Delaware corporation that was actually created in
6 January, 1996. Correct?

7 A Correct.

8 Q And that was part of the Fresenius transaction when
9 everything was ready to go on that transaction in September.

10 MR. BERNICK: Objection are we talking specifically
11 about the creation of Holdings?

12 MR. PRATT: Yes, Grace Holdings was created in
13 January, 1996.

14 A Correct.

15 MR. BERNICK: Right, and so you --

16 Q Do you agree with that?

17 MR. BERNICK: Then I don't understand the question.
18 If this was created in 1996 and the transaction doesn't take
19 place until September, then I don't understand what your
20 question is.

21 MR. PRATT: Well, Your Honor, the witness just
22 testified that Grace Holdings was created in January, 1996, and
23 maybe just for clarification --

24 Q Mr. Shelnitz, was that in preparation for a transaction
25 that would occur later?

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1 MR. BERNICK: Oh, okay, so for a transaction not
2 specifically the Fresenius transaction?

3 MR. PRATT: A transaction.

4 A I don't recall.

5 Q Okay. Grace Holdings, Inc. is a Delaware corporation?

6 A Yes.

7 Q And as part of the Fresenius transaction, that was
8 actually renamed. Wasn't it?

9 A Yes.

10 Q And the renaming of the company was W.R. Grace and Co.

11 A That's what I said earlier, yes.

12 Q But it remained a Delaware corporation.

13 A Yes.

14 Q So W.R. Grace and Co., a Delaware corporation, is the same
15 company as Grace Holdings, Inc. It's just been that the name
16 changed.

17 A Yes.

18 Q And it says on here Grace Holdings, Inc. I'm looking at
19 the second block down. It says Parent 2. Is that right?

20 A Yes.

21 Q So we can call that Parent 2 for purposes of these slides?

22 A Once the -- yes. Once the spinoff occurred, it became the
23 ultimate parent and direct parent of Grace-Conn.

24 MR. BERNICK: Your Honor, again this is all -- I mean
25 this is Note 7. It's right on the face of the slide. I -- so

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1 far, we're just reiterating. Is there something that's
2 different?

3 MR. PRATT: Your Honor, I'm moving right along here.
4 This isn't going to take too long. This is a very complicated
5 set of slides and, obviously, some very complicated
6 transactions.

7 THE COURT: Go ahead, Mr. Pratt.

8 MR. PRATT: Thank you, Judge.

9 Q Mr. Shelnitz, we're looking at Slide 5, Exhibit 507-5.
10 And here again, Mr. Shelnitz, Parent 1 is W.R. Grace and Co., a
11 New York corporation. Right?

12 A Correct.

13 Q And this illustrates the closing that happened in the
14 Fresenius transaction in September, 1996. Now, the block on
15 the left here, it says, "Parent 1 merged with a Fresenius
16 Medical Care, A.G. subsidiary and was renamed Fresenius
17 National Medical Care, Inc." I want to ask you a couple of
18 things about that just as a point of clarification, and I want
19 to contrast that with Slide Number 8. So let me just put this
20 up for a minute. Now, here this block says, "Sealed Air
21 Corporation merged into Parent 2," it doesn't say merged with
22 Parent 2. It says merged into. And I want to go back to Slide
23 5, Exhibit 507-5 and ask you about this Note 8 at the upper
24 left. Isn't what actually happened that Fresenius had a
25 subsidiary and, actually, during this transaction the

1 subsidiary merged into Parent 1, Grace New York?

2 A I think that's correct.

3 Q Okay, so that after the merger Parent 1, Grace New York,
4 was the surviving company?

5 A That's correct.

6 Q All right. Now, second of all, in this block up here it
7 says that, "As a part of this transaction, Parent 1, Grace New
8 York, was renamed Fresenius National Medical Care, Inc."
9 Actually, at the time of the transaction wasn't that entity
10 called -- renamed Fresenius National Medical Care Holdings,
11 Inc.?

12 A It may have been. That would've been within Fresenius'
13 domain as to what to change the name to.

14 Q You don't recall one way or the other?

15 MR. BERNICK: Holdings, Inc.?

16 MR. PRATT: Yes, Fresenius National Medical Care
17 Holdings, Inc.

18 MR. BERNICK: Holdings.

19 MR. PRATT: Your Honor, just to expedite this, I
20 could try to refresh the witness' recollection, but maybe Mr.
21 Bernick will stipulate to it. If we look at the plan
22 definition -- and I'm looking now in Section 1.1 of the plan,
23 Page 25. This is 1.1, Subparagraph 115, and it's a defined
24 term, FCMH -- FMCH -- I'm sorry -- and that's says, "Fresenius
25 Medical Care Holdings, Inc., a New York corporation, formerly

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1 named W.R. Grace and Co. and Fresenius National Medical Care
2 Holdings, Inc. and its affiliates."

3 MR. BERNICK: Well, actually, the difference there is
4 the word National, so we're happy to make any and all
5 corrections that are appropriate to make this slide accurate.
6 I'm not prepared to agree to change some language in the plan
7 at this point --

8 MR. PRATT: No. No. No.

9 MR. BERNICK: -- as it -- so --

10 MR. PRATT: No, I think, actually, Mr. Bernick, this
11 definition is correct. The former name at the time of the
12 Fresenius transaction was Fresenius National Medical Care
13 Holdings, Inc.

14 MR. BERNICK: Okay. I've got that one down.

15 MR. PRATT: Okay.

16 MR. BERNICK: Okay. Now, do you want me to change 8
17 up at the top to say merged into?

18 MR. PRATT: No.

19 MR. BERNICK: Or that actually would be wrong.
20 Right?

21 MR. PRATT: Not necessary. Not necessary --

22 MR. BERNICK: Okay.

23 MR. PRATT: -- at all. I think merged with is good
24 enough for now. The witness explained --

25 MR. BERNICK: Terrific.

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1 MR. PRATT: -- that actually the Grace entity was the
2 surviving entity. But I'm focusing now just on the name. When
3 that entity was renamed, the new name was not as shown on this
4 slide by one word. Instead, the new name, in fact, was
5 Fresenius National Medical Care Holdings, Inc., and that's
6 reflected in the plan.

7 MR. BERNICK: Do I need it?

8 MR. PRATT: Can we have that stipulation, sir?

9 MR. BERNICK: What stipulation? That the chart
10 should say National Medical Care Holdings, Inc.? I'm prepared
11 to do that.

12 MR. PRATT: Very good. I'll move along then.

13 BY MR. PRATT:

14 Q Now, Mr. Shelnitz, Parent 1 -- what's labeled here Parent
15 1, W.R. Grace, a New York Corporation, the surviving entity of
16 this merger, is renamed Fresenius National Medical Care
17 Holdings, Inc. It's the same corporation, isn't it, as it
18 always was?

19 A Yes.

20 Q It's just got a new name?

21 A That's correct.

22 Q Okay. We're now at Slide 6, Exhibit 507-6. Now, Mr.
23 Shelnitz, this transaction occurred in March of 1998, did it
24 not?

25 A Correct.

1 Q And for purposes of the Fresenius and to seal their
2 issues, essentially nothing changed from the closing of the
3 Fresenius transaction in September 1996 up until the closing of
4 the Sealed Air transaction in March 1998, is that true?

5 A Other than the transactions depicted in Steps 9 and 11,
6 and then perhaps 10, that would be correct.

7 Q Okay. But, at the top of the chart, that would be the
8 same. And this --

9 A Same Parent 2, correct.

10 Q Okay. So, this Slide 6 says at the top, "Pre-Sealed Air
11 transaction." We still have at the top, Parent 2. That's W.R.
12 Grace, a Delaware Corporation, formerly named Grace Holdings,
13 Inc., correct?

14 A Correct.

15 Q Okay. I'm at Slide 7, 507-7. Now, here we have at the
16 top where it says Parent 2, that same entity, W.R. Grace and
17 Co., a Delaware Corporation, formerly named Grace Holdings,
18 Inc., correct?

19 A Correct.

20 Q And a new company was created, Grace Specialty Chemicals,
21 right?

22 A Yes.

23 Q And that's a Delaware Corporation?

24 A Yes.

25 Q And as it shows here on Note 14 at the side of this slide,

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1 that entity was renamed W.R. Grace and Co., correct?

2 A Following the spinoff, correct.

3 Q And again, this was just a name change, but that entity is
4 the same entity as it was before, a Delaware Corporation?

5 A Correct.

6 Q But, it's now named W.R. Grace and Co., a Delaware
7 Corporation?

8 A Correct.

9 Q Okay. We're at Slide 8, 507-8. Now, here, Parent 2 at
10 the top on the left, that's W.R. Grace, a Delaware Corporation,
11 correct?

12 A Correct.

13 Q And that gets renamed Sealed Air Corporation?

14 A Correct.

15 Q And here the Note 15 says that Sealed Air Corporation
16 merged into Parent 2, W.R. Grace, a Delaware Corporation. So,
17 that was a surviving entity, right?

18 THE COURT: Which was?

19 A Parent 2 was a surviving entity.

20 Q Parent 2 was a surviving entity. And Parent 2 was then
21 renamed Sealed Air Corporation?

22 A Correct.

23 Q And that's the same company as it always was, it just now
24 has a new name?

25 MR. BERNICK: Well, if you're talking about the

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1 corporate entity as opposed to the business --

2 MR. PRATT: That's exactly right.

3 A It's a corporate entity, correct.

4 Q It's the same corporate entity.

5 A It's the same corporate entity.

6 Q Okay. So, it started out as Grace Holdings, Inc. It
7 became W.R. Grace and Co., a Delaware Corporation, and now it's
8 named Sealed Air Corporation.

9 MR. BERNICK: Whoa, whoa, whoa. It was Grace --
10 let's make sure. Grace Holdings -- your question was Grace
11 Holdings, Inc., then it became W.R. Grace and Co. --

12 MR. PRATT: A Delaware Corporation.

13 MR. BERNICK: -- a Delaware Corporation. And then
14 you're --

15 MR. PRATT: And that happened in 1996.

16 MR. BERNICK: Right. And now you're saying it
17 becomes Sealed Air as a result of the Sealed Air transaction?

18 MR. PRATT: Right.

19 BY MR. PRATT:

20 Q And that's just a name change, not a change in corporate
21 status?

22 A Correct.

23 Q Okay. And that happened in March of 1998?

24 A Yes.

25 Q So, today we have at the top, Parent 3. That's W.R. Grace

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1 and Co., a Delaware Corporation, right?

2 A Right, the second one. Right.

3 Q And that's a different entity from Parent 2 which was W.R.
4 Grace, a Delaware Corporation, now named Sealed Air
5 Corporation?

6 A Correct.

7 Q Okay. But they at one time were each called W.R. Grace
8 and Co., a Delaware Corporation, but -- excuse me -- the
9 existing one was changed to Sealed Air, and this is the new one
10 here?

11 A Correct.

12 MR. BERNICK: Well, that's very -- object to the form
13 of question. That's very ambiguous I think.

14 MR. PRATT: I'll withdraw that question, Your Honor.

15 MR. BERNICK: Can I pause here for just a moment, Mr.
16 Pratt? Of all the things that we've now gone through, the one
17 substantive change that you want to make is on Slide 5 where it
18 says Parent 1 renamed Fresenius National Medical Care, Inc.,
19 you want to insert Holdings after Care, is that right?

20 MR. PRATT: Yes. Both places that it appears. It
21 appears in Note 8 at the top at the upper left, and it appears
22 in the middle block on the right-hand side.

23 MR. BERNICK: Okay. So, we -- Your Honor, we will go
24 back and double check the documentation. And if that change is
25 correct, as I believe it may well be, but I don't know, we will

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1 make that change and re-designate 5075 as 5075-A, and also be
2 prepared to tender that as a demonstrative in connection with
3 Mr. Shelnitz's testimony.

4 THE COURT: That's fine.

5 MR. BERNICK: We have to double check first because
6 nobody wants to trust their recollection, and particularly mine
7 because it's a recollection of something I've never seen.

8 MR. PRATT: Your Honor, I'd like to hand the witness
9 Exhibit Plan Proponent 243 which is in evidence by stipulation
10 this morning.

11 THE COURT: All right.

12 Q Mr. Shelnitz, have you ever seen this document before do
13 you recall?

14 A I believe I've seen it.

15 Q Okay. I'd like you to go to down at the lower right-hand
16 side there -- what we used to call Bates numbers down there.
17 Do you see that?

18 A Yes.

19 Q 9916?

20 A Yes.

21 Q I'd like you to go over to Page Number 9938, please.

22 A Okay.

23 Q And this is the declaration of your former boss, David
24 Siegel, right?

25 A Yes.

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1 MR. PRATT: I'll just note for the record, Your
2 Honor, that this is -- this declaration on the last page has a
3 date on it, April 2, 2001.

4 Q Now, Mr. Shelnitz, at that time Mr. Siegel was senior vice
5 president and general counsel of W.R. Grace and Co., a Delaware
6 Corporation, and Grace Conn., is that correct?

7 A Yes.

8 Q And as general counsel, did he sometimes execute
9 declarations the same way you do?

10 A I believe he did.

11 Q And that would be in the ordinary course of his duties as
12 an officer of the company, if the occasion arose to require
13 that?

14 A Yes.

15 Q Okay. Now, you'll see the last sentence here on the
16 first -- on this page, 9938, in which Mr. Siegel says under
17 penalty of perjury, "I'm authorized to make this declaration on
18 behalf of Grace, Grace Conn. and the other debtors in these
19 bankruptcy cases." Do you have any reason to doubt that Mr.
20 Siegel is authorized to sign this on behalf of those companies?

21 A Without reading through the declaration I couldn't be
22 sure, but he certainly had powers as an officer of the company
23 to execute documents.

24 Q Okay.

25 MR. PRATT: Your Honor, I'm going to go through this

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1 one very quickly. The purpose for it is -- and it's already in
2 evidence -- but the purpose for it is, that it puts in succinct
3 narrative form what we just went through with all of those
4 slides. And I think it'll be helpful to the Court to have that
5 written down as opposed to question and answer because this is
6 very succinct, and I think it's right. And I just want to
7 confirm with this witness that it is right based on his
8 understanding.

9 THE COURT: All right.

10 MR. BERNICK: That should not -- that proffer should
11 not be --

12 THE COURT: Your microphone.

13 MR. BERNICK: That proffer should definitely not be
14 accepted. This document was proffered into evidence yesterday,
15 and it was accepted under extremely limited circumstances
16 because there was a complaint that was coming in through a
17 different witness. And, Your Honor, I objected --

18 THE COURT: No, actually, I struck it yesterday, but
19 it was admitted by a stipulation this morning.

20 MR. BERNICK: Admitted by a stipulation this morning
21 for whatever purpose it was that was being proffered yesterday,
22 I believe, to establish the truth of the matters that are set
23 forth in the document. It is not -- we did not accept it as a
24 stipulated document for that purpose at all. It is what it is
25 on the face of it. It's a verified complaint in the attached

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1 declaration. The declaration does not supplant the testimony,
2 and it's certainly not as complete or detailed a recitation,
3 and therefore the proffer should be refused.

4 MR. PRATT: Your Honor --

5 MR. BERNICK: The purpose of this -- excuse me -- the
6 purpose of this declaration was simply to tell the history
7 leading up to a verified complaint that was filed for the sole
8 purpose of getting a stay for purposes of shutting down related
9 litigation. And that was its only purpose. This witness can't
10 verify the accuracy of what Mr. Siegel did at the time. Let me
11 take that back. He can verify the accuracy of it.

12 If the question being put to the witness is whether
13 this declaration is accurate, that question can be put. But,
14 the document can't be tendered as a more succinct recitation of
15 exactly the same facts, a) before there's the verification, and
16 b) before it's established that by being more succinct it's
17 also, you know, better. It has better quality evidence. I
18 just don't understand what the purpose of the proffer is other
19 than to suggest that this is the more accurate statement of the
20 entire history which we're certainly not going to accept
21 without a -- you know, suitable testimony from the witness.

22 MR. PRATT: Could I respond, Your Honor? First of
23 all, this is already in evidence. Second of all, the witness
24 said he's seen it before. Third of all, I'm going to ask him
25 questions to confirm whether certain limited statements in here

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1 are correct, and they happen to be more succinct than the
2 narrative testimony.

3 But, in any event, Your Honor, this is an admission
4 of a party opponent. We've already established that Mr. Siegel
5 was an officer of Grace at the time he signed it. He had
6 authority to sign it in the course of his duties, and that
7 makes it an admission of a party opponent under Federal Rule of
8 Evidence 801(b)(2)(a) and (c). So, I think it's admissible as
9 an admission. It's not -- certainly not hearsay.

10 Now, Mr. Bernick might prefer that relevant evidence
11 like this not come in, but, Your Honor, let me go back to my
12 stop light analogy. If a witness testifies that the light was
13 red on Monday, and then on Tuesday -- excuse me -- if the
14 witness admits on Monday that the light was red, and then on
15 Tuesday while he's on the stand he says the light was actually
16 magenta, that doesn't mean that Monday's testimony can't be
17 admitted. Of course it can.

18 It's relevant because it has some tendency and reason
19 to prove a fact that's of consequence to the determination of
20 the action. And all I'm doing is going through the same facts
21 that Mr. Bernick has already said are of consequence to the
22 determination of this case. So, it's certainly admissible, and
23 it's not going to take very long, Your Honor. Three minutes.

24 THE COURT: What --

25 MR. BERNICK: Your Honor, I have no problem with the

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1 admission of the document. We've already agreed to it. It's
2 the purpose of the proffer which is to somehow supplant,
3 because that's what he said, a more accurate and more concise
4 recitation of facts. That --

5 MR. PRATT: Not --

6 MR. BERNICK: -- excuse me. That proffer is not --
7 we don't believe it's a correct proffer. And the best way to
8 find out what is different or what he believes is the magenta
9 versus the green light, we don't need a traffic accident
10 analogy to establish that there's something that's wrong
11 pointed out. It took us a half an hour to get to one change of
12 one statement. Maybe an important one, but we shouldn't be
13 going through line by line by line if there is an
14 inconsistency.

15 THE COURT: Mr. Pratt, I don't know whether you're
16 trying to substantiate that there's an inconsistency or a
17 verification.

18 MR. PRATT: I'm not, Your Honor. Actually, I have --
19 Mr. Bernick has misstated my position on this. I'm not
20 intending to show that there's any inconsistency at all with
21 the -- what's already of record, but I think this basically
22 gives it in a slightly different form, and again, I think this
23 is easier to understand --

24 THE COURT: Okay. Is --

25 MR. PRATT: -- because it is so succinct.

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1 THE COURT: Is there a reason why since it's in
2 evidence I simply can't read it and it will be informing as to
3 whatever --

4 MR. PRATT: Well --

5 THE COURT: -- extent it is more succinct?

6 MR. PRATT: Mr. Bernick just said that without a
7 foundation that what I'm trying to establish is in here and
8 it's true and that's all I intend to ask Mr. Shelnitz.

9 THE COURT: Well, it's a verified complaint by an
10 officer of the company.

11 MR. BERNICK: Yes. And we're not --

12 MR. LOCKWOOD: Your Honor, it's admitted. It is what
13 it is.

14 THE COURT: Mr. Pratt, I'll give you a little bit of
15 leeway, but to the extent that it's already in evidence, I will
16 be reading all of the evidence at some point.

17 MR. PRATT: I hope to save you the trouble, Your
18 Honor.

19 THE COURT: It won't save me the trouble. I'll have
20 to read it anyway. But, go ahead.

21 MR. PRATT: Thank you, Judge.

22 BY MR. PRATT:

23 Q Mr. Shelnitz, could you turn to Page 9940 and look at
24 Paragraph 7? Do you have that there?

25 A Yes.

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1 Q Okay. And I'm just going to read the first sentence. "In
2 1988 Grace reincorporated in New York through the formation of
3 a new holding company also named W.R. Grace and Co., Grace, New
4 York." My question for you, sir, is, is that Parent 1 on Slide
5 2?

6 A Yes. After the reorganization occurred -- I mean, it
7 would be technically inaccurate to say that the formation of
8 the new holding company was named W.R. Grace and Co. It wasn't
9 initially named W.R. Grace and Co., but it ultimately became
10 W.R. Grace and Co. and is what we refer to as Parent 1 --

11 MR. BERNICK: Your Honor, I'm going to really object
12 as being completely cumulative. If we have to have what is now
13 clearly going to be a recitation of four pages out of the
14 declaration and getting the witness' concurrence as to each one
15 and tying it back to the slide, that is completely wasteful of
16 the Court's time --

17 MR. PRATT: Your Honor --

18 MR. BERNICK: -- and it's cumulative.

19 MR. PRATT: -- talking about a waste of time, we'll
20 be through with this before he's finished with --

21 MR. BERNICK: Well, that was a promise that was made
22 a long time ago and it's not been discharged.

23 THE COURT: Mr. Bernick, I think he's right. We're
24 taking -- we're wasting time. Mr. Pratt, I'll give you some
25 leeway, but to the extent it's cumulative, the witness has now

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1 testified twice about the slides. He made absolutely no
2 changes except for the name of one of the companies.

3 MR. PRATT: I understand, Your Honor.

4 THE COURT: So, I don't need it a third time.

5 Q Page 9941, Mr. Shelnitz, Paragraph 10. Would you look at
6 Paragraph 10, please?

7 A Okay. Do you want me to read it?

8 Q Just to yourself.

9 (Pause)

10 A Okay.

11 Q Is there anything inaccurate about everything except the
12 last sentence?

13 A I guess I'm now questioning whether the entity was Grace
14 Holdings, Inc. or Grace Holding, Inc.

15 Q Okay.

16 MR. PRATT: Your Honor, I'll rest on the exhibit at
17 this point.

18 (Pause)

19 Q Mr. Shelnitz, the demonstratives -- Mr. Bernick's
20 demonstratives, Exhibits 507-1 and so on --

21 A Yes.

22 Q -- when was the first time you saw those?

23 A I don't remember if I saw them for the first time
24 yesterday or the day before.

25 Q Okay.

1 A Probably yesterday.

2 Q You did not prepare these?

3 MR. BERNICK: Oh, I'm sorry. Objection. Ambiguous.

4 Q Did you have any involvement at all in the preparation of
5 these exhibits?

6 A I don't know what you mean by involvement.

7 Q Did you supply information that went into the preparation
8 of these exhibits?

9 A Yes.

10 Q Okay. And did you meet with anyone in connection with
11 that process?

12 A Yes.

13 Q How long were you in that meeting?

14 A It was no one meeting that -- I was asked to help Kirkland
15 & Ellis prepare charts depicted in the transaction. I gave
16 them information. They prepared charts. I looked at the
17 charts to see if I thought they were accurate. That was
18 basically what my involvement was.

19 Q And that was after reviewing all of the documentation that
20 you said you reviewed?

21 A What documentation?

22 Q Well, I think on the foundation for the documents, I had
23 understood that you basically went back and reviewed documents
24 regarding the transaction structure.

25 A I had briefly reviewed the documents some time ago.

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1 Q Okay. Now, the purpose of these documents was, as Mr.
2 Bernick described it, to talk about 524(g) protection for
3 Sealed Air Corporation and Fresenius as former parents of Grace
4 entities. And in that regard I want to go back to a couple of
5 those slides. And I'll start with Slide 5 which is Exhibit
6 507-5. Now, do you see these yellow bubbles here?

7 A Yes.

8 Q And it says underneath PLTF. I guess that's Plaintiff A
9 versus Parent?

10 A That's what it says, yes.

11 Q And you find the same thing over on the right, Plaintiff A
12 versus Parent. Now, does this indicate that if a plaintiff or
13 a claimant has a claim against Parent 1, and that's W.R. Grace
14 and Co., a New York Corporation, that as a result of this
15 transaction where that parent -- actually, the Fresenius
16 subsidiary merged into that parent, then the parent's name was
17 changed to Fresenius National Medical Care Holdings, Inc. And
18 you see the same yellow bubbles found there, Plaintiff A versus
19 Parent. That's an indication that if a plaintiff or a claimant
20 has a claim against Parent 1 that that claim after the merger
21 now is properly asserted against the same entity, Parent 1, but
22 now newly named Fresenius, is that correct?

23 MR. BERNICK: Objection. Properly.

24 THE COURT: That's sustained.

25 MR. PRATT: I didn't understand the objection, Your

1 Honor.

2 MR. BERNICK: The objection actually calls for a
3 legal conclusion, and also makes assumptions about whether to
4 prosecute such a claim would be proper. That is, whether it
5 would have some validity to it or otherwise enjoy some kind of
6 sanction or blessing by somebody under some authority.

7 MR. PRATT: Well, I'm not asking for sanction. Maybe
8 the way to get around that is to talk about what the
9 circumstances were at the time of this transaction in September
10 1996.

11 Q Mr. Shelnitz, is it your understanding that claimants
12 against this entity, Parent 1, W.R. Grace and Co., a New York
13 Corporation, if there are claims asserted against that entity
14 at that time, nothing about this transaction would change the
15 liability or lack thereof when the name was changed to
16 Fresenius?

17 MR. BERNICK: Objection. Calls for a legal
18 conclusion.

19 THE COURT: It does. The way you're stating the
20 question does call for a legal conclusion. If you want to get
21 to the facts I think the information could be gotten on record,
22 but not in that fashion.

23 MR. PRATT: Okay.

24 Q Did you talk to anyone about the yellow that's on this
25 slide?

1 A No.

2 MR. BERNICK: Objection.

3 THE WITNESS: Sorry.

4 MR. BERNICK: Go ahead.

5 MR. PRATT: It was a yes or no question.

6 A I did not talk to anybody about the yellow portions. I
7 had not seen that in an earlier draft.

8 Q Okay.

9 MR. PRATT: Your Honor, I'm just going to note for
10 the record because this may become very important later that
11 although notwithstanding Mr. Bernick's proffer that the
12 relevance of this witness and these charts is 524(g) protection
13 for the parents, without that legal conclusion, so far on this
14 record there's no showing at all that that injunctive relief or
15 stay is necessary for any purpose.

16 MR. BERNICK: Your Honor, it --

17 MR. PRATT: And I'll leave it at that.

18 MR. BERNICK: Your Honor --

19 MR. PRATT: And we can argue about it later in our
20 briefs.

21 MR. BERNICK: Okay. Your Honor, just --

22 MR. PRATT: And I pass the witness, Your Honor.

23 MR. BERNICK: Just for purposes of clarifying the
24 proffer, the witness is not being proffered to testify
25 regarding the necessity for injunctive relief. That's not the

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1 purpose of the witness' testimony. The purpose of the witness'
2 testimony -- nor is the purpose of the witness' testimony to
3 speak to what may be BeaconOne, Seaton's collateral interest in
4 what certain settlement documents may or may not provide which
5 really is the entire motivation for their cross examination.

6 The purpose of the proffer is to establish that to
7 the extent that 524(g)'s other requirements are met, that
8 Sealed Air and Fresenius would qualify to be covered by 524(g)
9 because they are a former parent. That is the sole purpose of
10 the proffer. It is a technical requirement of 524(g) which we
11 wanted to make sure was met.

12 So, the purpose of having Mr. Shelnitz testify has
13 nothing to do with the necessity other than to the fact that
14 there was preexisting litigation that was, in fact, stayed.
15 The purpose of this proffer is to establish compliance with the
16 parental requirement for want of a better word under 524(g).

17 MR. PRATT: Your Honor, my rejoinder. Having read
18 the Plan Proponent's pretrial brief, this issue will come back,
19 and I just want everybody to remember that I was shut down by
20 Mr. Bernick in trying to have this witness explain what we just
21 talked about.

22 THE COURT: No, Mr. Pratt, you're not being shut down
23 by Mr. Bernick. You're asking questions that lead to legal
24 conclusions, so I've sustained the objections. You may ask
25 this witness factual predicates that you are trying to get out.

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1 It's just that he hasn't been called as an expert witness to
2 provide legal opinions. And to the extent that they go to the
3 ultimate -- ultimate findings that the Court has to make,
4 that's the finder of facts province. But, you're not being
5 closed from asking this witness fact questions.

6 MR. PRATT: Okay. I'll try a couple of more things.

7 MR. BERNICK: Your Honor, while that colloquy took
8 place we did make some progress with respect to holdings. And
9 it is Holdings, Inc. So, we will amend the slide. And the
10 slide that is going to be enhanced through the cross
11 examination of Mr. Pratt is 507-5 which we will re-tender as
12 5075-A with the appropriate correction.

13 THE COURT: All right.

14 MR. PRATT: Your Honor, I have two other lines of
15 inquiry.

16 BY MR. PRATT:

17 Q Mr. Shelnitz, are you aware that my clients, OneBeacon and
18 Seaton, have asserted claims against Fresenius and Sealed Air?

19 A I believe so.

20 Q How did you become aware of that?

21 A I was shown letters by Kirkland & Ellis asserting claims
22 against those entities.

23 Q Do you recall how many letters?

24 A Two or three.

25 Q Okay. I'm going to show you what's been marked for

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1 identification as Plan Proponent's Exhibits 238, 239 and 240.

2

3

(Pause)

4

MR. PRATT: Your Honor, just for the record, you'll
5 see that Plan Proponent Exhibit 240 is not their standard
6 exhibit sticker, but actually it is their exhibit. And it just
7 had been I think erroneously marked as confidential, but I
8 don't think it is, and so I'm using it.

9

THE COURT: All right.

10 Q Are these the letters, Mr. Shelnitz?

11 A I believe so.

12 Q And what was your purpose in reviewing these letters?

13

MR. BERNICK: Your Honor, at this point I would
14 object on the grounds that it invades the attorney/client
15 privilege.

16

MR. PRATT: Well, Your Honor, all I asked was for his
17 purpose in reviewing the letters.

18

MR. BERNICK: Well, that's -- that --

19

MR. PRATT: I don't see how that's privileged.

20

MR. BERNICK: The general counsel of a company is --
21 not simply ask for the fact of having done the review, which is
22 revealing, but why he did it? That is classic privileged
23 information.

24

THE COURT: Particularly --

25

MR. BERNICK: And it's with regard to a subject that

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1 was not part of my examination at all.

2 MR. PRATT: Your Honor, I'll withdraw the question.
3 But, what I'd like to do is to move these in evidence solely
4 for the purpose of showing that these are the letters that Mr.
5 Shelnitz reviewed, and he's already said that.

6 MR. BERNICK: Well, it doesn't establish that they're
7 relevant to anything. What's the relevance?

8 MR. PRATT: I'll get to the relevance.

9 MR. BERNICK: Well, then, I object on relevance
10 grounds.

11 THE COURT: Well, establish the relevance and then
12 I'll rule on the admission.

13 MR. PRATT: Okay. Your Honor, let me just make a
14 general proffer of relevance. These letters show, and they're
15 not offered for the truth at all. What they're offered for is
16 to show that Seaton and OneBeacon are presently asserting
17 claims against Fresenius and Sealed Air, these letters spell
18 out the nature of those claims. And we're not saying that
19 anybody has to accept those assertions as true or not true.
20 That won't be determined in this court I don't think. But, the
21 relevance of these is that the plan will enjoin these claims
22 and release these claims. And we contend that those provisions
23 of the plan are not lawful. And that's the relevance.

24 THE COURT: All right. I'll accept Exhibits 238, 239
25 and 240 for that purpose.

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1 MR. BERNICK: Well, Your Honor, if I can be heard
2 just briefly.

3 THE COURT: All right.

4 MR. BERNICK: The proffer is inconsistent with the
5 asserted relevance. The proffer is not for the truth of the
6 matters asserted but for the fact of their being asserted. The
7 relevance is -- depends upon the truth of the matter asserted
8 which is that, in fact, they have a claim.

9 MR. PRATT: Well, it goes further than that, Mr.
10 Bernick --

11 MR. BERNICK: Excuse me, Mr. Pratt.

12 MR. PRATT: -- it's that --

13 MR. BERNICK: Excuse me, Mr. Pratt.

14 THE COURT: Gentlemen.

15 MR. BERNICK: The -- when you tender something for
16 the fact of its being said as opposed to the truth of the
17 matter therein, all that it really represents is that a letter
18 was sent on a certain date at a certain time with respect to a
19 certain subject matter. It has nothing to do with establishing
20 any aspect of that subject matter as being true. So, if they
21 now say, well, we do have claims and the claims are channeled
22 and released, that presumes the truth of the matter set forth
23 in the letter.

24 MR. PRATT: Your Honor --

25 MR. BERNICK: So, the proffer is inconsistent.

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1 Moreover, the witness simply said he saw it. That's all that
2 he has said. Can't come in through this witness for any
3 purpose. It's just, he saw it. And he saw it presumably on or
4 after July 8, 2009. That is long after this plan was drafted
5 and long after it was put in place. So, it can't possibly bear
6 upon the good faith or other intendment of the proposing
7 part -- or the proposing parties or the planned proponents or
8 Mr. Shelnitz in particular.

9 And if he wants to get this stuff in for the purpose
10 that he seeks he's got to have a witness. Maybe he wants to
11 take the stand and Mr. Brown wants to take the stand and get
12 them in, but Mr. Shelnitz is not an appropriate witness to
13 sponsor the tendering of these documents. And they're all
14 self-serving.

15 MR. PRATT: May I respond, Your Honor?

16 THE COURT: Yes.

17 MR. PRATT: These documents show -- the witness
18 testified that he was aware of claims asserted against
19 Fresenius and Sealed Air by OneBeacon and Seaton. He said that
20 he had received these letters --

21 THE COURT: No. He said he had seen these letters.

22 MR. PRATT: He had seen these letters. Now, what
23 that establishes is that Grace -- this man's an officer of
24 Grace Co. and Grace Conn., and that establishes that those two
25 debtors have notice of these claims.

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1 THE COURT: Regardless. If they're dated -- and I
2 didn't pick this up because the date wasn't stated -- July 8th,
3 2009, is after this plan was prepared and filed.

4 MR. PRATT: Your Honor, but --

5 THE COURT: So, that doesn't substantiate the notice
6 for the purpose that you're offering.

7 MR. PRATT: Your Honor, Mr. Bernick used the word
8 good faith. That's not my proffer. My proffer is that the
9 injunctions and the plan with respect to these claims do not
10 comply with 524(g) and do not --

11 THE COURT: But, apparently, these claims were
12 submitted to the debtor after the plan was proposed. So,
13 essentially, OneBeacon and Seaton are trying to bootstrap
14 themselves into a finding that the plan is unlawful because of
15 a claim that they submitted after the plan was filed. You
16 can't do it that way, Mr. Pratt.

17 MR. PRATT: No, Your Honor, that's not. If the plan
18 is confirmed the injunctions will go into effect on the
19 effective date. On the effective date. That's in the future.

20 THE COURT: Yes.

21 MR. PRATT: So, these claims exist as of the date of
22 this letter, actually before if you read the letter. That's
23 our position. But, at least as of the date of the letter
24 whether the claims exist or not is not what we're trying to
25 show. What we're trying to show is that of July 8, 2009,

1 OneBeacon and Seaton have asserted these claims, and Grace is
2 on notice of that as of this date. And if the plan becomes
3 effective it is our argument, it will be our argument, it has
4 been our argument in our briefs that there's no compliance
5 with, for example, 105 in the case law under that.

6 THE COURT: Regardless. I understand the purpose for
7 which they're being offered. I agree with Mr. Bernick having
8 seen this. This witness is not copied on these documents.
9 They are not addressed to him. And his testimony was that he
10 got them from counsel -- his counsel, Kirkland and -- the
11 company's counsel, Kirkland & Ellis, and in fact, the entities
12 on the ccs are all attorneys from Kirkland & Ellis; Mr.
13 Bernick, Mr. Freedman, Ms. Baer and Ms. Esayan, at least at
14 the time. I'm not sure when Ms. Baer changed law firms, but
15 she is clearly here representing the debtor in that capacity.
16 So, this witness cannot be the authenticating witness for these
17 documents.

18 MR. PRATT: Your Honor --

19 THE COURT: You need a witness, Mr. Pratt.

20 MR. PRATT: -- I'm not trying to authenticate them.
21 The witness testified that he was aware of claims, and he
22 testified that it had -- he didn't say when, but it had to have
23 been after July 8th.

24 THE COURT: And his -- it doesn't have to have been
25 after July. You didn't ask him that question. He did say that

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1 he believes these are the letters that he was shown by his
2 counsel. To the extent that they are somehow being delivered
3 by counsel, that may invade the attorney/client privilege,
4 although I don't think so far we've necessarily gone that far.
5 But, this witness cannot authenticate these documents.

6 His testimony is that he's aware of claims. The
7 letters don't add to that testimony. If anything, it's
8 cumulative. I don't know what the letters say, so I don't know
9 whether they're prejudicial in the sense that Mr. Bernick seems
10 to be arguing. I'm not making any assessment of that. I
11 haven't seen them. But, this witness is not the proper witness
12 through whom to put in these documents. So, the objection's
13 sustained. I'm not accepting the witness' -- the letters,
14 pardon me, even for that limited purpose, but you may certainly
15 put them in through a different witness.

16 MR. PRATT: Well, let me ask just a couple of more
17 questions about it since the witness did say he saw the
18 letters.

19 BY MR. PRATT:

20 Q Mr. Shelnitz, when did you see them?

21 A After July 9th. I don't recall specifically.

22 Q Okay. But, you did say that you were aware that OneBeacon
23 and Seaton are presently asserting claims against Fresenius and
24 Sealed Air?

25 A I do recall -- it wasn't until at least the beginning to

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1 middle of August that I saw the letters. I was focused more on
2 the claim -- the Kaneb claim relating to Fresenius'
3 representation.

4 Q Okay. Mr. Shelnitz, you're generally familiar with the
5 Chapter 11 plan that's being proposed?

6 A Generally.

7 Q Are you aware that that plan contains a provision for a
8 successor claims injunction?

9 A Yes.

10 Q Now, you were proffered as a witness with respect to
11 bankruptcy protection for Sealed Air and Fresenius, so I'm
12 going to ask you, and on the basis that those companies are
13 former parents of Grace entities. And that means that -- well,
14 let me ask you, do you know what the purpose of the successor
15 claims injunction is?

16 A I believe so.

17 MR. BERNICK: Your Honor, this really gets into
18 completely -- a) it's duplicative of ad nauseum efforts to
19 elicit similar testimony yesterday, b) the witness is
20 essentially being asked to comment on a legal document which
21 has legal significance under 524(g), and that really is a
22 matter that calls for a legal conclusion. So, we would object
23 to the testimony -- object to the questioning on this subject
24 as being cumulative and being an effort to elicit legal
25 testimony from the general counsel of W.R. Grace.

1 MR. PRATT: Your Honor, just a note of point of
2 order. My question of the witness was, "Mr. Shelnitz, do you
3 know the purpose of the successor claims injunction?" And his
4 answer was, "I believe so." And Mr. Bernick then objected and
5 made a long speaking objection, warning the witness off of my
6 questioning on the basis that it was a legal conclusion.

7 MR. BERNICK: It was a yellow light.

8 MR. PRATT: I just asked a simple question, does he
9 know the purpose of the successor claims injunction, and the
10 answer was yes. And if I interpret Mr. Bernick's colloquy
11 there as a motion to strike, I think it should be denied.

12 THE COURT: No. The next question I think is, what
13 was the purpose, and that's what Mr. Bernick objected to.

14 MR. PRATT: Well --

15 THE COURT: It was calling for a legal conclusion,
16 not the foundation question.

17 MR. PRATT: And I'll address that, Your Honor. It's
18 not a legal conclusion at all. As Your Honor knows, the
19 purpose of various provisions of the plan is brought out in
20 testimony in bankruptcy court all the time in this court and
21 elsewhere. It's proper questioning, and it's highly relevant.
22 How can the Court understand -- how can the Court approve this
23 injunction without knowing what the purpose --

24 MR. BERNICK: I'll -- let him ask that question. And
25 then I want to get up on redirect examination, and we're going

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1 to find out why it was so critical to have this provision
2 related to successor liability -- we'll do it.

3 THE COURT: That's fine. Let's -- if we'd stop with
4 the speaking and ask the questions we'd get done a lot further.
5 Fine. Go ahead, Mr. Pratt.

6 MR. PRATT: Thank you, Your Honor.

7 BY MR. PRATT:

8 Q Mr. Shelnitz, what is, to your understanding, the purpose
9 of the successor claims injunction?

10 MR. BERNICK: Go ahead.

11 THE WITNESS: Okay.

12 A It was to protect Fresenius and Sealed Air from
13 liabilities, both asbestos and non-asbestos-related.

14 Q Asbestos and non-asbestos-related did you say?

15 A Correct.

16 Q Okay. Now, that -- that's in Section 8.5 of the plan.
17 And there were some technical amendments very recently to that
18 section, were there not?

19 MR. BERNICK: Objection. Lack of foundation. It's
20 also a statement by counsel regarding the plan. Move to strike
21 the statement.

22 MR. PRATT: Well, let me do it over. Your Honor,
23 I'll just note for the record that on or about September 4, the
24 Plan Proponents filed a notice of first set of modifications to
25 joint plan of reorganization. And part of that was a black

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1 line revision. And I'd like to hand that to the Court and to
2 the witness, Section 8.5, the successor claims injunction. It
3 was changed.

4 THE COURT: All right. Cathy?

5 Q Mr. Shelnitz, you're aware that modifications were made to
6 the plan?

7 A Yes.

8 Q And you're aware that modifications were made to the
9 successor claims injunction?

10 A I do not recall that specifically.

11 Q Do you know -- and that's a yes or no -- do you know what
12 was the purpose of the revisions to Section 8.5 reflected in
13 the modifications?

14 A No.

15 MR. PRATT: I pass the witness, Your Honor.

16 THE COURT: Anyone else? Mr. Bernick?

17 MR. BERNICK: I just need a moment to confer with Mr.
18 Freedman on the technical matter.

19 (Pause)

20 REDIRECT EXAMINATION

21 BY MR. BERNICK:

22 Q Mr. Shelnitz, in connection with my direct examination I
23 introduced into evidence various documents that you testified
24 reflected the pre and post-petition litigation that was now
25 being mounted against Fresenius and Sealed Air relating to

1 claims -- tort liability of Grace, do you recall that?

2 A Yes.

3 Q Okay. And you were then shown also Plan Proponent's
4 Exhibit 243 which was the verified complaint for declaratory
5 and injunction -- injunctive relief by Mr. Pratt.

6 A Yes.

7 Q Do you recall what this verified complaint was for?

8 A Only very generally.

9 Q Take a look at Page 2, Summary of Action. It says, "This
10 is an adversary proceeding brought ... for a judgment sub or
11 Romanette (1) enjoining defendants from prosecuting pending
12 asbestos-related actions. The "asbestos actions" and
13 commencing new actions or proceedings asserting asbestos-
14 related claims to future actions, except pursuant to the terms
15 of any plan or plans of reorganization to be confirmed in these
16 cases against three categories of persons or entities." And we
17 then see listed Sealed Air and Fresenius. Do you see that?

18 A Yes.

19 Q Does that refresh your recollection about the
20 circumstances leading to the prosecution of this adversary?

21 A Yes.

22 Q What happened?

23 A Well, when Grace filed for Chapter 11 protection we
24 continued to get lawsuits, or I should say Sealed Air and
25 Fresenius continued to get lawsuits --

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1 MR. PRATT: Objection, Your Honor. That lacks
2 foundation, how does he know?

3 THE COURT: Sustained.

4 Q And did these facts come to your attention in your
5 capacity as being in-house counsel for Grace?

6 A Yes.

7 Q Okay. Go on.

8 A The -- Grace was very concerned that -- if those lawsuits
9 were permitted to continue that any adverse rulings or any
10 damages resulting from those lawsuits would result in
11 indemnification claims by Fresenius or Sealed Air against the
12 debtors --

13 MR. PRATT: Your Honor --

14 A -- thereby negatively impacting the estates in their --
15 its reorganization.

16 MR. PRATT: Excuse me, Your Honor. Excuse me. The
17 witness should be cautioned about waiving the attorney/client
18 privilege.

19 MR. BERNICK: Yes, we'll avoid that.

20 Q So, I want to direct your attention to the face of the
21 document that Mr. Pratt brought to your attention. Take a look
22 at Page 10, Paragraph 31. It says, "As of the date of this
23 filing, Sealed Air is a named defendant in over 6,000 asbestos
24 actions in which the debtors also have been named as
25 defendants, including eight purported class actions, one of

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1 whom -- which has been certified." Do you recall, Mr.
2 Shelnitz, that in open proceedings before Judge Farnan at the
3 very outset of the case that there was very active litigation
4 within the bankruptcy case over stays and injunctions of claims
5 being brought against third parties that related in part to
6 Grace's asbestos liability?

7 A Yes.

8 MR. PRATT: Objection, Your Honor. Compound. Mr.
9 Bernick just read Paragraph 31. Now, this document is an
10 admission of Grace. I can use it. He cannot.

11 MR. BERNICK: Okay. So --

12 MR. PRATT: It is not established that 31, that the
13 facts in 31 are true. And then after reading that he asked a
14 different question.

15 THE COURT: That's sustained.

16 MR. PRATT: And I move to strike them both. He
17 should ask one question at a time.

18 THE COURT: All right.

19 MR. BERNICK: I'll rephrase the question. But, I
20 believe at this point as an officer of the Court there is no
21 question but that all of this took place. None of it was
22 appealed. The orders were entered. Those orders were
23 predicated on an onslaught of litigation against Sealed Air and
24 Fresenius. And for counsel to somehow suggest that this is
25 actually disputed, I don't believe comports with the

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1 obligations of an officer of the Court.

2 MR. PRATT: Your Honor --

3 MR. BERNICK: I will go ahead and ask Mr. Shelnitz
4 the questions independently so that we can just get this out
5 simply.

6 Q Mr. Shelnitz, shortly after the bankruptcy began, was
7 there or was there not bankruptcy court litigation arising out
8 of the fact that was asserted by Sealed Air and Fresenius that
9 they were now being exposed to the tort system?

10 A Yes.

11 Q In the course of that proceeding, were submissions made to
12 the Court by Grace that put before the Court the growing
13 litigation being prosecuted against Sealed Air and Fresenius?

14 MR. PRATT: Your Honor, my clients were not parties
15 to that litigation. This line is completely irrelevant. This
16 is the confirmation hearing. It's not that lawsuit.

17 MR. BERNICK: No, to the contrary. The door's now
18 been open, and it is relevant because it goes to the 524(g)
19 injunction. It also goes to the successor liability question
20 that Mr. Shelnitz was just asked which is what I want to get
21 to.

22 MR. PRATT: Your Honor, goose-gander rule. I was not
23 allowed to ask this witness about things that Mr. Bernick said
24 were legal conclusions about claims. What Mr. Bernick's now
25 trying to do through this witness is to talk about litigation

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1 for which my client was not a party and bootstrap that in as
2 evidence in this confirmation hearing.

3 THE COURT: Well, actually --

4 MR. PRATT: He needs -- if he wants to show what the
5 nature of the claims were against Fresenius and Sealed Air
6 he'll have to bring somebody in.

7 THE COURT: I don't think that's the question. The
8 question was whether submissions were made to the Court by
9 Grace to put the allegations that were in the complaints
10 against -- or the fact that Sealed Air and Fresenius allege
11 that they were being sued before the Court. That, I think, is
12 a factual contention. But, I don't have any foundation laid
13 for the fact that this witness has personal knowledge. He's
14 not the affiant.

15 MR. BERNICK: No, but that's not -- I think, really
16 the question that I meant to put to Mr. Shelnitz, and I'll
17 rephrase it.

18 BY MR. BERNICK:

19 Q As a fact of what happened in the bankruptcy court in the
20 open record for all interested parties in the litigation to
21 see, were there submissions made, put in before the open court,
22 the litigation that was being conducted against Fresenius and
23 Sealed Air?

24 MR. PRATT: Objection, Your Honor.

25 THE COURT: Overruled. That's a fact question.

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1 MR. PRATT: May I be heard, Your Honor, on my
2 objection?

3 THE COURT: Mr. Pratt, I can take judicial notice of
4 the fact that the documents are of record. I don't even need
5 the witness to say that. The allegations are clearly of
6 record. I'm not taking them for the truth or not the truth,
7 but the allegations are of record. They're in this document.
8 They're part of the record before this Court.

9 MR. PRATT: Your Honor, let me just -- can I be
10 heard?

11 THE COURT: If you can get the microphone turned on.

12 MR. PRATT: Let me come up. Mr. Bernick very
13 skillfully said that these allegations were made in court.
14 They were made in part -- as part of an adversary proceeding.

15 THE COURT: No. Actually, he said that they were
16 made in documents that were filed in the court, I believe.

17 MR. BERNICK: Actually were made in open court before
18 the adversary was even filed.

19 THE COURT: Oh. Well --

20 MR. BERNICK: The adversary was filed --

21 THE COURT: -- if that's the case --

22 MR. BERNICK: -- to cure a technical issue about how
23 to get the injunction.

24 MR. PRATT: And there's --

25 THE COURT: Okay. I'm sorry. I missed the question.

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1 MR. PRATT: Well, and there's another issue that I
2 just want to bring up, Your Honor, because I think it's
3 pertinent and it's going to come up again. Mr. Bernick also
4 said that any interested party could see them. Well, you have
5 to be on notice before you know to look. And there's no
6 evidence in this record that my clients, OneBeacon and Seaton,
7 received notice of this bankruptcy case until years later.

8 THE COURT: Pardon me. The fact that W.R. Grace was
9 in bankruptcy wasn't known on an international level?

10 MR. PRATT: Your Honor, notice was not given.
11 Notices -- there's nothing in the record to establish -- I'll
12 give you an example, Your Honor. My firm got into this case
13 after the bar date passed, so we had a problem.

14 MR. BERNICK: What is it -- this is --

15 MR. PRATT: This is colloquy, Mr. Bernick.

16 MR. BERNICK: It's not offered for the purposes of
17 notice.

18 THE COURT: Mr. Bernick, please. It's Mr. Pratt's
19 turn.

20 MR. PRATT: Thank you, Judge. We got into this case
21 after the claims bar date. So, one of the first emergencies
22 that we had was, what do we do? We checked. There was no
23 notice given to Seaton and OneBeacon of the claims bar date,
24 and that's reflected in stipulations that had been filed, and
25 the Court's approved them, and that's in the main case, not in

1 an adversary proceeding.

2 THE COURT: But --

3 MR. PRATT: There's no record that notice was given
4 of this proceeding, the adversary proceeding that's the subject
5 of that document.

6 THE COURT: Okay. But, what's the point? I'm
7 missing what the connection is that you're trying to make.

8 MR. PRATT: Well, I'm just trying to establish that
9 Mr. Bernick's questions lack foundation. This document can
10 come in, and I can use it because it's an admission of a party
11 opponent. Mr. Bernick can't use it because it's not my
12 admission.

13 MR. BERNICK: I'm not using it anymore. I didn't
14 even make reference to it.

15 THE COURT: He isn't making reference to the
16 complaint because of the objection that I sustained that you
17 made earlier. This question was about whether the witness had
18 some knowledge about allegations that were apparently made in
19 open court. I missed it. Rephrase the question, Mr. Bernick,
20 and let's get on with this.

21 MR. BERNICK: Your Honor, I would love to but for
22 the --

23 THE COURT: Mr. Bernick, rephrase the question.

24 MR. BERNICK: Yes.

25 BY MR. BERNICK:

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1 Q Mr. Shelnitz, at the time -- Mr. Shelnitz, in open court
2 in the early stages of the bankruptcy proceeding were pleadings
3 filed and statements made regarding the prosecution of tort
4 litigation relating to Grace now against Fresenius and Sealed
5 Air?

6 MR. PRATT: Objection, Your Honor. That question is
7 not relevant, but it also exceeds the scope of --

8 THE CLERK: I'm not picking you up.

9 MR. PRATT: -- cross. This is redirect.

10 THE COURT: That microphone's not on.

11 THE CLERK: I'm not picking him up.

12 THE COURT: Can you press the one in front of Mr.
13 Brown? I think it's just not turned on.

14 MR. PRATT: It is on, Your Honor.

15 THE COURT: The only one that shouldn't be working is
16 the other one.

17 MR. PRATT: I'll get right close to it.

18 THE COURT: You don't need to do that once it's on,
19 okay?

20 MR. PRATT: Okay. I'll try to calibrate. Your
21 Honor, this -- Mr. Bernick's most recent question is not
22 relevant at all based on the way he proffered this witness, but
23 also, and just as importantly, it exceeds the scope of my
24 cross.

25 THE COURT: It does exceed the scope of the cross.

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1 The relevance, frankly, I've lost. I don't have any idea what
2 the relevance is at this point, Mr. Bernick. But, it does
3 exceed the scope of the cross.

4 MR. BERNICK: I'll go back and we'll tie up first
5 rather than last.

6 BY MR. BERNICK:

7 Q Do you recall that you were asked on cross examination --
8 I don't know why we're getting feedback -- do you recall that
9 you were asked on cross examination what the purpose of the
10 provision was relating to successor liability?

11 A Yes.

12 Q And do you recall that you answered that question by
13 saying the purpose of that provision was to protect Sealed Air
14 and Fresenius? Do you recall that?

15 A Correct. Yes.

16 Q Now, Fresenius -- Sealed Air and Fresenius, tell the Court
17 whether or not in connection with the plan of reorganization
18 Sealed Air and Fresenius are contributing money to the estate.

19 MR. PRATT: Objection, Your Honor. That clearly
20 exceeds scope of cross.

21 MR. BERNICK: No, it -- it's the whole purpose. He
22 asked the question what's the purpose of the provision. The
23 purpose of the provision is totally plain. They're major
24 contributors to this case. I want to get that fact out --

25 THE COURT: The objection is overruled. You may

1 answer the question.

2 A Yes, a very substantial portion.

3 Q Okay. Do you know -- are you familiar with the settlement
4 agreements, and indeed the order that was entered by Judge
5 Wolin approving those settlements?

6 MR. PRATT: Objection, Your Honor. We have the same
7 notice problem. My clients were not on notice of that order
8 and --

9 MR. BERNICK: It's not offered for notice.

10 MR. PRATT: Well, you're talking about it and leading
11 the witness toward -- down the road toward it.

12 MR. LOCKWOOD: Your Honor, Mr. Pratt is testifying
13 that his clients didn't get notice.

14 MR. PRATT: I'm showing that there's a lack of --

15 MR. LOCKWOOD: If he wants to put on a witness --
16 excuse me --

17 MR. PRATT: I'm showing that there's a lack of
18 foundation.

19 THE COURT: I don't know that there's a lack of --

20 MR. LOCKWOOD: There's -- a statement of counsel
21 about facts is not --

22 THE COURT: Counsel, you know what? We're going to
23 break for lunch because this has just gotten out of control.
24 We're in recess until one-thirty and we will reconvene. You
25 folks get control of yourselves while we're gone.

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1 UNIDENTIFIED ATTORNEY: Your Honor, can I just have a
2 housekeeping, Your Honor?

3 THE COURT: No. After one-thirty.

4 (Recess)

5 THE COURT: Please be seated. Are you ready to
6 begin, Mr. Bernick? Yes?

7 MR. BERNICK: Yes, I'm ready.

8 THE COURT: Okay.

9 MR. BERNICK: Well, we're going to try to make it
10 unnecessary. Over the lunch hour, in order to expedite the
11 proceeding and get Dr. Peterson on who has a very urgent family
12 need to get back this afternoon -- this evening, we're not
13 going to conduct any further cross exam -- redirect examination
14 I should say of Mr. Shelnitz.

15 THE COURT: All right.

16 MR. PRATT: No further cross, Your Honor.

17 THE COURT: You're excused, then, Mr. Shelnitz.

18 THE WITNESS: Thank you.

19 MR. FINCH: Your Honor, the Plan Proponents call Dr.
20 Mark Peterson.

21 THE COURT: Thank you.

22 MARK PETERSON, PLAN PROPONENT'S WITNESS, SWORN

23 MR. FINCH: Your Honor, we have the same witness
24 notebook for Dr. Peterson as before. We also have a set of
25 demonstrative exhibits which have been pre-marked as Plan

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1 Proponent's Exhibit 178-B. Does Your Honor have both of those
2 in front of --

3 THE COURT: I do. Thank you.

4 MR. FINCH: -- her?

5 DIRECT EXAMINATION

6 BY MR. FINCH:

7 Q Dr. Peterson, do you still have -- do you have those
8 exhibits in front of you?

9 A Yes, I do.

10 Q Dr. Peterson, are you the same person who testified
11 extensively last week about your qualifications and expertise
12 in estimating the value of asbestos personal injury claims?

13 A I believe so, yes.

14 (Laughter)

15 Q Have you done anything in the intervening time period to
16 add to your knowledge about asbestos litigation generally or
17 Grace specifically?

18 A A couple things.

19 Q Could you describe those briefly, please?

20 A I read the testimony in this hearing of Mr. Hughes, and I
21 looked at some financial statements for Union Carbide, recent
22 financial statements.

23 Q In your work in doing estimates for asbestos liabilities,
24 do you from time to time provide estimates of the liabilities
25 of a trust?

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1 A Yes.

2 Q A 524(g) asbestos settlement trust?

3 A Frequently.

4 Q And does that require you to review the medical and
5 exposure criteria of trust distribution processes to make those
6 estimates?

7 A Yes.

8 Q And do you compare them to companies' claim settlement
9 practices pre-petition to do that?

10 A Yes, that's one of the steps.

11 MR. FINCH: Your Honor, last week you recognized Dr.
12 Peterson as an expert in asbestos claims valuation which
13 includes estimating the value of asbestos personal injury
14 claims, the factors that drive those values, the projection of
15 the number and timing of future asbestos personal injury
16 claims, and the cost to resolve pending and future asbestos
17 personal injury claims. We would add -- we would proffer Dr.
18 Peterson as an expert in all of those subjects here, as well as
19 expertise in projecting the liabilities of an asbestos 524(g)
20 trust.

21 THE COURT: Any objection?

22 (No audible response)

23 THE COURT: He may express those opinions as an
24 expert.

25 Q Dr. Peterson, did you prepare some slides to help

1 illustrate your testimony today?

2 A Yes, I did.

3 Q Who determined the content of those slides?

4 A I did with my associates.

5 Q Would that be Mr. Relis (phonetic)?

6 A Yes.

7 Q Did you oversee the -- did you review every slide?

8 A Yes.

9 Q Does every slide accurately convey and summarize your
10 testimony?

11 A Yes.

12 Q If I were to ask you one question could you explain your
13 estimation -- opinions here using those slides? Could you
14 spend an hour using those slides to describe them?

15 A Yes, certainly.

16 MR. FINCH: Could we have Slide 8, please? Exhibit
17 178, Slide 8.

18 Q While we're waiting for the slide to be on the screen, Dr.
19 Peterson, could you describe briefly the approach and sources
20 of data you used to estimate the liabilities of an asbestos
21 defendant in the tort system?

22 A Generally I used the same approaches and type of research
23 that I do for both my academic work at Rand and elsewhere and
24 engagements like this. It's primarily two streams of work.
25 One is quantitative analysis. I'm very interested in and do a

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1 great deal of quantitative analysis in the work I do. I'm an
2 unusual lawyer in that regard, I guess.

3 And the other track of it, though, is to obtain as
4 much information as I can from documents, from parties that are
5 participating in the litigation, from any source in order to
6 better understand the data. And data aren't meaningful
7 unless -- and analysis of them aren't meaningful really unless
8 you have some understanding and hypotheses about what the data
9 mean and what relationships are. So, I try and embed myself on
10 that.

11 In this case it was reading documents from W.R.
12 Grace, reading transcripts of opinions -- transcripts of
13 depositions by primarily people working for and handling the
14 claims for Grace, talking with lawyers. I didn't have much
15 access to the debtors' personnel who handle asbestos litigation
16 for most of the cases. It's one of the reasons why the
17 depositions and testimony of Mr. Hughes was important. Things
18 like that in order to understand it not only for this company,
19 but for similar companies. I -- again, financial statements.
20 I gather as much information as I can and try and put it
21 altogether and use that to form my quantitative analysis.

22 Q Do you use epidemiology at all in projecting future
23 asbestos liabilities?

24 A Yes. It's central to the forecast in your future claims
25 because the filing of claims as a function of how many people

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1 get sick, which is epidemiology, and how many people once
2 they're sick made claims, which is a claiming process and a
3 part of behavior in the litigation system which is kind of the
4 central focus of my research.

5 MR. FINCH: There's been an exhibit entered into
6 evidence in this case already, Your Honor. It's Plan
7 Proponent's Exhibit Number 7 which is Grace's historical claims
8 database.

9 Q Did you use that in your work in estimating Grace's
10 asbestos liabilities, Dr. Peterson?

11 A Yes. It was a database provided to us in 2002. It was
12 the asbestos claims database, CMS database that Grace had.
13 It's the same database you referred to.

14 Q Does Slide 8 that's on the screen accurately summarize the
15 sources of data and approach you used to estimate Grace's
16 liability?

17 A Yes. I guess the one thing that I'd add is that I -- all
18 of this is, of course, informed by, and in turn contributes to
19 the academic research I do too. That I and others.

20 Q Is there an approach to estimating asbestos liabilities
21 that has been used by people in addition to you, a general
22 approach to doing such an estimate in your view?

23 A Yes. I describe it as the standard approach. It was
24 first developed by the dean of Yale Business School in 1981 and
25 '82 in work he was doing for insurance companies. It's been

1 used since by almost -- most people that do asbestos
2 forecasting, and I refer to it as the standard method.

3 Q And what are the components of the standard approach as
4 you view it?

5 A Well, there are two -- again, two aspects of it. One is
6 that for purposes of valuing claims, analysts look to the
7 market. There's really a marketplace of settlements. Since
8 asbestos litigation began there are millions of settlements
9 that have been achieved across defendants. For any particular
10 company like W.R. Grace there are hundreds of thousands of
11 settlements over time under varying circumstances

12 But, that magnitude of events, of recurrent common
13 events, presents a lot of information about the marketplace for
14 valuing asbestos claims. And so, that's how claims are valued.
15 That's the one stream, and basically value claims based upon
16 the marketplace are both what it's been historically and what
17 it is currently. And second is to -- is the forecast method
18 uses epidemiology as I've described earlier, which provides us
19 with information about both past and future incidents of
20 asbestos-related cancers and combine that with data -- from a
21 database like W.R. Grace's which tells us how many people have
22 filed claims and do a quantitative analyses comparing those two
23 sets of information, the incidents data and the past filing
24 data. And that's really the standard method.

25 Q Does Slide 9 summarize your view of what the standard

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1 approach is for forecasting asbestos personal injury
2 liabilities?

3 A Yes.

4 Q Next slide, please, that'll be Slide 10. Dr. Peterson,
5 has standard -- can we call this the historical base approach
6 to estimating liability?

7 A Whatever, sure. I understand it.

8 Q The standard historical base approach, can you describe to
9 the Court the types of entities that have either used that
10 methodology or described that methodology and relied on it in
11 their work?

12 A Well, it's been the primary type of analysis done by
13 analysts in cases like this. Most analysts use it, they may
14 use a variant or additional work, too, but it's really the
15 primary method and as such, it is then used by courts, when
16 courts reach decisions in estimation cases, typically it's
17 based upon the same principles that I just described and we've
18 called the standard historical approach. So, courts and
19 parties in bankruptcy, is commonly what people use. It's the
20 only method I've ever used.

21 Q How about people outside of bankruptcy type litigation,
22 what types of parties have used this historical base approach
23 to estimate asbestos liabilities?

24 A Well, it's the bases for most financial analyses done by
25 companies and their professionals for their own financial

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1 planning, as well as for financial reporting. It's also the
2 basis for calculation by asbestos trusts, in determining what
3 percentage, what the pari passu percent they can pay to all
4 claimants.

5 Q As part of your work in this bankruptcy case, did you
6 investigate whether or not the W.R. Grace Company ever used the
7 standard historical base approach to project its asbestos
8 liabilities at any point in time?

9 A Yes, I investigated that and I saw that, in fact, they
10 did. They hired outside analysts to do that, who provided that
11 kind of information.

12 Q Now, at what point in time did they do that?

13 A Well, they did it up until the preparation for the
14 estimation in this case, but they were using it for the
15 financial reporting, certainly up to the time of the
16 bankruptcy.

17 Q Are you applying -- when you do an estimate that you
18 present to a court, of a company asbestos liability, are you
19 applying the same methodology that you use in non-litigation
20 contexts, such as providing advice to an ACC or a trust?

21 A Yes. Or advice to insurance companies or businesses, yes.

22 Q What are the major components of an estimate of total
23 liability for an asbestos defendant?

24 THE COURT: I'm sorry, Mr. Finch, I couldn't hear
25 you.

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1 Q Sure. If you could describe, Dr. Peterson, what makes up
2 the total asbestos liability of a defendant?

3 A Well, it's separate analyses of the total liability for
4 pending claims. Claims, by pending, I mean pre-petition
5 claims. They were pending at the time of the bankruptcy and
6 then future claims. You calculate those separately for reasons
7 that I'll describe in a bit, and add them up and that's the
8 total liability. But it's broken down, and there are separate
9 steps for each of those.

10 Q Could I have Slide 14. Are those the steps you just
11 described, Dr. Peterson?

12 A Yes.

13 Q Let's turn first to the first box, liability for pending
14 claims. Can you describe very briefly the steps or the
15 components that you used to value pending claims against an
16 asbestos defendant?

17 A Yes. For both pending and future claims, for that matter,
18 the total liability of pending claims is a multiplication of
19 three elements. It's the number of claims that are pending
20 times the percent of those claims that we estimate will be
21 paid, called percentage paid, and the third element is the
22 average value that will be paid to claims that receive payment.

23 That calculation, those three steps, are done
24 separately for diseases because the values of disease claims
25 vary. Meso is much more valuable and expensive for a company,

1 than others. So, you need to do that separately. And then
2 maybe with some time value adjustments in that sum, to produce
3 the total.

4 Q Is Slide 15 what you just described?

5 A Yes, it is. Let me add, though, that colored -- the two
6 boxes on the left are red because together they represent the
7 number of compensable claims. You take the number of claims
8 and you multiply it by what percent you think are going to be
9 paid. Sometimes analysts calculate that directly. I like to
10 calculate each of the two components of that because they're
11 not always -- they're independent, they vary differently with
12 each other and it's useful to be able to identify and discuss
13 and consider each of those separately.

14 Q Okay. So, is it correct, then, that if you had, say, a
15 thousand claims in a given disease category and a percent paid
16 of 70 percent, how many compensable claims would that result
17 in?

18 A Well, 700. And that's the key number. I mean, it is
19 simplest, it's just the number of claims that will be paid
20 times the average they get. Everything is -- all of the
21 analyses is addressed to getting to that point.

22 Q How did you go about determining the number of claims that
23 were pending against the W.R. Grace Company at the time that it
24 sought Chapter 11 protection?

25 A We used the count of claims in the database, claims that

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1 were identified in W.R. Grace's prepetition database that were
2 identified in that database as having been unsettled at the
3 time of -- and unresolved at the time of the bankruptcy. And
4 there are two subsets of that. There are claims that actually
5 were settled, but were -- they were liquidated but unpaid. And
6 then there are claims that were unliquidated and that was the
7 basis for our calculation of the number of pending claims.

8 Q Does the W.R. Grace database also have data about claims
9 that were resolved historically and been paid, either by
10 judgment or settlement, before Grace sought bankruptcy?

11 A Yes, and that's the key to calculating the other
12 parameters.

13 Q Okay. Could you turn to the next slide, please, Slide 16?

14 A Yes. This summarizes our data, W.R. Grace's data. It
15 shows on the right the total number of resolved claims. It was
16 193,000 resolved claims. There were 135,000 pending claims of
17 which 18,500 were claims that were liquidated but had not yet
18 been paid.

19 Q Does that mean a claim that is settled but not yet --
20 Grace hadn't yet cut the check?

21 A Yes.

22 Q Do you follow a process to remove stale or inactive claims
23 from the pending claims analysis, and if so, could you describe
24 it to the Court?

25 A Yes. I mean, among the 116,670 claims that were

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1 unliquidated and pending, there are claims that we believe will
2 never be pursued. They're essentially, they sit on the
3 database, but they're not significant and they shouldn't and
4 can't and don't enter into our calculation of liability. Some
5 of those are claims that you mentioned are stale, that's a term
6 that we and other analysts use. There are claims that have
7 been filed many years ago, say before 1990, that remain
8 unresolved. We assumed that any claim that had been -- we
9 actually did a lot of analysis looking at this, what's the
10 likelihood that those claims would settle, because you could
11 look at patterns. How, you know, basically what's the rate of
12 still being resolved even though it's a 20 year old claim, some
13 do settle, but not many, so effectively what we assumed is that
14 all claims filed prior to 1990 are stale, they've basically
15 been abandoned by the law firm and a claimant, they just have
16 not been removed from the database and we eliminated a little
17 over 7,000 of those claims, as stale.

18 There will be some claims filed later that probably
19 will become stale but the statistics that we looked at, suggest
20 that it's a much less frequent issue in more recently filed
21 claims. There's something about the 1980s era of claims that
22 mean they were filed but nothing is ever done with them.

23 Q Okay. Now, I notice a column on the chart up there --
24 first of all, is that the data that comes right out of Grace's
25 database after you have analyzed it?

1 A Yes.

2 Q That's Slide 16. What is the UNSP?

3 A It's unspecified. It's very common in a database of an
4 asbestos defendant to have claims filed and the database
5 doesn't reveal what the disease is for a claim. Presumably,
6 the plaintiff's lawyer and the claimant know the disease but it
7 either isn't reflected on the complaint because there's often
8 generic terms that are used in the specific disease, doesn't
9 need to be identified in many jurisdictions, or the database
10 didn't get it entered.

11 Q Okay. Do you have a methodology for dealing with
12 unspecified disease claims in a database, and if so, could you
13 very briefly describe it?

14 A Yes. It's one of several general approaches that are
15 used. What we do is, we look to data from the Manville Trust.
16 The Manville Trust is the largest asbestos trust and it made --
17 for a while was making it's data available to people like me,
18 publicly for a fee, and what we did is, we linked these claims,
19 using social security numbers from the Grace database to the
20 Manville database, and for those that we could, we identified
21 what disease did the Manville Trust say the claim had, and we
22 were able to obtain, I think, 37 or 38,000 identifications of
23 diseases for claimants. For the remainders that we couldn't
24 identify, we looked at the distributions, basically, what did
25 Manville say, what percentage of claims turned out to be

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1 mesothelioma, what percent non-malignant and we just applied
2 that percentage across all the remaining claims that we either
3 couldn't match to Manville, or for which Manville also didn't
4 have a disease. With --

5 Q But --

6 A -- with one exception.

7 Q Excuse me, Doctor, Slide 20 please.

8 A Yes.

9 Q Dr. Peterson, does Slide 20 show the distribution of
10 pending Grace claims across diseases, once you go through this
11 process of dealing with stale claims and claims where the
12 disease is not specified in the database?

13 A Yes. But it retains 6329 unresolved claims as not having
14 asbestos disease and that's because historically W.R. Grace
15 resolved a certain percentage of claims that didn't -- without
16 identifying a disease and basically for no money. I mean they
17 just, again, it's an indication of a claim that didn't go
18 anywhere. So, we assume that among the 109,000 pending claims,
19 some fraction of them, or about 6 percent, will be just like
20 these resolved claims, will end up being resolved without
21 payment, without ever finding out what the disease is and
22 basically, who cares. I mean the forecast just ignores those
23 claims.

24 Q So, those claims are treated as a zero value in your
25 forecast?

1 A They're treated at zero value and they're not counted in
2 forecasting in future claims. They have no impact upon the
3 forecast. We just ignore -- like the stair claims, we ignore
4 them.

5 Q How many pending mesothelioma claims were there at the
6 time W.R. Grace went into bankruptcy?

7 A We believe that there were 3,024 of which 2,885 were
8 unliquidated.

9 Q And how many total claims were pending at the time that
10 Grace went into bankruptcy?

11 A 127,770, of which 109,250 were unliquidated.

12 Q As part of your estimation work and other for the Grace
13 ACC in this case, did you become generally familiar with the
14 criteria that Grace would apply before offering a settlement to
15 an asbestos personal injury claimant, before Grace went into
16 bankruptcy?

17 A Yes. That was part of the process I described earlier,
18 learning about that.

19 Q And, could you describe just very briefly what Grace's
20 general approach and criteria for resolving asbestos personal
21 injury claims was before it went into this bankruptcy?

22 A According to documents from W.R. Grace and statements by
23 the people like Mr. Hughes, who handled those claims, they
24 required evidence of exposure to asbestos, of exposure to a
25 Grace asbestos product and of an asbestos -- some, at least

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1 minimally credible evidence of an asbestos related disease, all
2 sufficient to withstand summary judgment. There had to be a
3 meaningful cause of action.

4 Q Could you turn to Slide 21, please? Does Slide 21 show
5 some of the documents that you reviewed that set forth Grace's
6 criteria for resolving asbestos personal injury claims?

7 A Yes, excerpts from a couple.

8 Q What does Grace's historical data show --

9 THE COURT: Mr. Finch, you need to stay by a
10 microphone, I'm sorry.

11 MR. FINCH: I'm sorry, I'm sorry, Your Honor.

12 Q I'll root myself to the podium here. What does Grace's
13 historical data show about what was going on with respect to
14 the values of its mesothelioma claims in the years prior to its
15 going into bankruptcy? If you could just describe that just
16 generally very briefly?

17 A They were increasing, pretty much from across the board,
18 from the early 1990s until the time of their bankruptcy, with
19 that increase accelerating in the couple of years prior to the
20 bankruptcy.

21 Q Could I have Slide 23, please? Dr. Peterson, what does
22 Slide 23 show?

23 A It shows in the red bar, the trends of settlement values
24 for mesothelioma claims by W.R. Grace and compares it to the
25 four other defendants that I discussed in my testimony last

1 week.

2 Q And, why did you pick those four defendants to illustrate
3 on the slide?

4 A One, I had public data for them; two, and that's
5 important. Second is that they were all companies that in some
6 measures were similar to W.R. Grace, and, three they -- except
7 for Owens-Corning, who has its own interest for that, the other
8 companies continued resolving claims after W.R. Grace went into
9 bankruptcy.

10 Q This chart shows mesothelioma values. Were Grace's
11 historical settlement averages rising for other diseases as
12 well?

13 A Yes. Certainly for the cancers. I think they were
14 relatively -- yes, they were increasing, yes.

15 Q As much as for mesothelioma?

16 A I think meso was the sharpest increase and that's typical
17 of defendants.

18 Q Did you come to an opinion or a conclusion as to what
19 factors were driving the increase in Grace's mesothelioma and
20 other claim values before it went into bankruptcy and did you
21 describe that to the Court last week?

22 A Prior to bankruptcy, one of the -- in the recent years,
23 one of the important factors was the bankruptcy petitions by
24 other asbestos defendants which began to increase the values it
25 was paying in 2000 and 2001. There were other elements. The

1 increasing number of settlements outside of an inventory
2 process, in more recent years. When Grace settled claims in
3 bulk, it got a break on the price. When they settled them more
4 separately, the price went up and there are year-to-year
5 fluctuations. Grace became a more prominent defendant over
6 time, it was relatively -- I wouldn't say obscure, but kind of
7 borderline of significance in the early and mid-90s and it
8 began to become more important at about the time that the CCR
9 defendants, claims against them were stayed and plaintiffs'
10 lawyers were looking for other additional defendants to
11 supplement the amount of money they lost when the stay was
12 entered in the CCR class action.

13 Q Did you review Grace's documents to see whether it stated
14 anything about what, if any, factors were acting in the tort
15 system that could have the effect or did have the effect of
16 increasing its cost to resolve asbestos claims?

17 A Yes. There's a discussion of a number of factors. Again,
18 the most important that they identified, according to them, was
19 the bankruptcies -- how many other defendants there are
20 available to help pay the liability and, therefore, the
21 bankruptcies of those defendants tended to drive the values up.
22 There are also factors that suppressed it. The pendency of the
23 bankruptcy tended to suppress values.

24 Q Is Slide 26 an accurate depiction of the document -- some
25 of the statements that you've reviewed and commented on in your

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1 report about Grace's warnings about the factors that would
2 increase its asbestos liability?

3 A Yes. This is a contemporaneous statement by W.R. Grace in
4 2000 about how it was being impacted and foresaw continuing
5 impacts of the insolvency of other asbestos defendants. And
6 the effect of it in the last point, it made it a riskier
7 environment with higher values.

8 Q We are sitting here in 2009 and we, obviously, have some
9 knowledge of what's gone on in the world since 2001 in asbestos
10 litigation. Did you come to an opinion or conclusion about
11 things that would affect Grace's asbestos liability, based on
12 information that became available since 2001, continuing to the
13 present day?

14 A Yes. I mean it's a real luxury for someone doing a
15 forecast to already know what happened for the first eight
16 years they're doing a forecast. We now, in 2009, have
17 hindsight, we can see what happened and it would be
18 unreasonable not to take that into account in the forecast that
19 we do and that's what I've done here.

20 Q And, you testified about some of those factors last week.
21 Does Slide 27 accurately set forth the primary factors in your
22 view that would have affected Grace's liability for pending and
23 future asbestos personal injury claims in the tort system?

24 A These are additional events that happened. I mean,
25 bankruptcies continue to expand to other companies.

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1 Non-malignant claims went down because of the legislation in
2 other matters, reducing the number of filings of non-malignant
3 claims, but perversely increasing the value -- particularly
4 mesos, I think I've testified about that last week. So, you
5 could see these continuing occurrences of events, all of which
6 contributed to the increasing values of claims, although the
7 non-malignant trend, obviously, really cut the number of non-
8 malignant claims.

9 Also, over this eight year period we had an
10 opportunity to test and verify Grace's prediction that it would
11 have -- that values would continue to increase for the reasons
12 they mention and we've been able to see that that's true.

13 Q How have you been able to do that?

14 A Well, by looking at the data that I showed you earlier
15 about what happened with U.S. Gypsum and Turner and Newell and
16 Quigley and other companies.

17 Q You also analyzed the publicly available data of other
18 companies that are still in asbestos tort litigation?

19 A Yes.

20 Q What companies?

21 A That are still in?

22 Q Still in?

23 A Publicly available?

24 Q Yeah, like in financial statements and such.

25 A Oh, financial statements, GAF, for example, G1 Industries,

1 looked at their statements. Asarco, looked at their
2 statements. Their data are not public.

3 Q You mentioned at the beginning of your -- never mind.
4 Last week we talked some with the Court about how these factors
5 affect the settlement averages, Grace, in your view, would be
6 likely to pay going forward. Do these factors also affect the
7 percent of claims that Grace would likely pay, had it not gone
8 into bankruptcy?

9 A It's harder to ferret it out, but yes, it certainly
10 suggests there would be fewer meso claims -- I mean, excuse me,
11 fewer non-malignant claims that would be paid for all the
12 reasons, for the tort reform and the increased scrutiny of
13 them, in particular. And, the experience of some other
14 companies was to be more critical and look more closely and,
15 therefore, pay a smaller percentage of claims. But I think
16 more than anything, it was kind of Grace's public announcement
17 of what its position was, that it probably would be a bit more
18 aggressive in reviewing claims. For all those reasons, I think
19 that probably there would have been a reduction in the number
20 of percentage of claims paid by W.R. Grace, after -- if it had
21 continued in litigation after the bankruptcy.

22 Q Could I have Slide 29 please? Dr. Peterson, did you
23 analyze Grace's historical database to determine what
24 percentage of mesothelioma claims it would pay money to?

25 A Yes. I looked first historically at the bottom, wider box

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1 shows what historically Grace's experience was in years 1999
2 through 2001 for each disease. For mesotheliomas, they paid
3 over 90 percent in each year, and it compares that with Turner
4 and Newell, one of the companies for whom I have publicly
5 accessible data. We had similar rates of payment of claims for
6 virtually every disease until 2001 when it sharply reduced --
7 it rejected many more claims than it had historically.

8 Q What happened to Turner and Newell in 2001 that made it,
9 in your mind, a good analog for what Grace would likely attempt
10 to do?

11 A Well, it -- prior to that, it was a member of the Center
12 for Claims Resolution, in --

13 Q I don't think the Judge has heard what the Center for
14 Claims Resolution is. Could you just describe briefly what
15 that is?

16 THE COURT: I think I know, but okay, go ahead.

17 THE WITNESS: It's a consortium of 20 asbestos
18 defendants that was created to control costs.

19 Q Okay, now go on.

20 A That disbanded at the beginning of 2001, so in 2001,
21 Turner Newell was now resolving cases in ordinary litigation,
22 and in a process that was similar to what Grace would be doing
23 on a going forward basis.

24 Q And so, in the forecast that you did or the estimate that
25 you did of the percentage of pending claims that Grace would

1 pay in the tort system had it not gone into bankruptcy, what
2 percentages did you use, is it shown on this chart?

3 THE COURT: I'm sorry, what was the question?

4 Q Sure. Dr. Peterson, did you do an estimate of the
5 percentage of pending claims that Grace would pay had it not
6 gone into bankruptcy?

7 A Yes.

8 Q And does it appear on this chart?

9 A Yes.

10 Q Can you describe where to the Court?

11 A It's the smaller box in the middle of the page, where it
12 has percent of claims paid forecast, there's two Grace reduced
13 and Grace lowest. We used really three alternative forecasts
14 in the report of which two, I think, were more credible, both
15 are a reduction. And the lowest is the rates that are derived
16 from -- slightly different from Turner Newell's, but similar to
17 them and they differ because of -- just differences in the
18 number, the composition of the database. So, that's meant to
19 replicate pretty much what the experience of Turner Newell and
20 other CCR defendants were in this period of time.

21 The Grace reduced is halfway between the historic
22 rates which are shown at the bottom of the page and the lowest
23 rates, because Turner Newell was a CCR member, I think its
24 having left CCR is a reason why its rates went as low as it
25 did. And I don't think that all of the same factors apply, so

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1 I think the more reasonable rate is to assume basically halfway
2 between what it did historically and what the experience of the
3 CCR members are and that's the reduced rate, which is basically
4 the 78.3 percent of the meso claims that were filed with Grace,
5 we assume would be paid and that, conversely, 21.7 percent
6 would be resolved without payment, which is far higher than the
7 less than 10 percent historically.

8 Q Did you compare your projection of Grace's likely
9 percentage of claims paid, to what a prominent asbestos
10 defendant was doing in the 1990s?

11 A Yes. Owens-Corning was on that earlier slide.
12 Owens-Corning was a major defendant and so we made that
13 comparison.

14 Q Could you describe very briefly to the Court the various
15 ways in which Owens-Corning attempted to resolve its asbestos
16 liability outside of bankruptcy?

17 A Well, beginning in the late 1980s and through -- for about
18 ten years, almost, Owens-Corning had a policy of being
19 aggressively litigating claims. Looking at them closely and
20 litigating them, with the hope that they would drive out claims
21 and discourage filings, and that turned out to be a disastrous
22 policy for them, but it shows what was the rate of being able
23 to reject claims by a company that was quite aggressive with
24 regard to its litigation posture.

25 Q Do you know whether or not Owens-Corning tried cases to

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1 judgment during that period of time?

2 A Oh, it tried over a thousand cases to judgment, and it won
3 about -- a little over half the time, but when it lost, it got
4 nailed badly.

5 Q And after this strategy by Owens-Corning to try its way
6 out of its asbestos problem, what did it attempt -- what did it
7 do next?

8 A Then it went into a process, it was quite similar to the
9 process that W.R. Grace did in recent years, of inventory
10 settlements. Their National Settlement Program, NSP, was where
11 they would basically do inventory settlements or large
12 settlements with law firms. They went from one extreme to
13 another, with settling almost all claims and trying to
14 negotiate terms for resolving future claims that would make it
15 -- give them some advantage in handling the future claims. And
16 that became a pretty common tactic that W.R. Grace,
17 Owens-Corning, others used in the late 1990s.

18 Q How did that work out for Owens-Corning?

19 A Well, they were going to go into bankruptcy no matter
20 what, but they had to spend a lot less money on indemnity, on
21 average, so they spent a lot more money in total because
22 they're resolving so many claims, they spent far less money on
23 defense costs, they were paying enormous burden on defense
24 costs which they basically were able to stop.

25 Q Slide 30, please. Dr. Peterson, what does Slide 30

1 depict?

2 A This shows my two forecasts of the Grace payment
3 percentage at the top, with what Owens-Corning achieved. In
4 the years in red, this was during its period of aggressively
5 reviewing and trying cases. And my point, really, in preparing
6 this is that even in those years when a significant defendant
7 was being very aggressive with rejecting claims, it achieved
8 rates of rejection that were actually not as low as I'm
9 forecasting Grace would have been able to continue. By
10 estimating that Grace would be able to get rid of so many
11 claims on being conservative, I'm underestimating the
12 liability.

13 Q Did you use various different quantitative methods to
14 estimate the value that Grace would pay to successful asbestos
15 personal injury claims as of the time of the bankruptcy?

16 A Settlement values.

17 Q Yes.

18 A Yes. I've described that in my testimony last week, we
19 used four different -- three different methods with data from
20 four different defendants to estimate, looking at experience of
21 claims, companies that continued to settle claims after Grace
22 went into bankruptcy, in order to come up with five alternative
23 estimates of how much Grace would have paid after bankruptcy,
24 if it had remained in litigation.

25 Q Okay. Can I have Slide 32, please? Does Slide 32 show

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1 your estimate of Grace's total liability for pending asbestos
2 personal injury claims as of April 1st, 2001?

3 A Yes.

4 Q And just -- I want to pick out a few things in the chart.
5 What is the value that you're using for settlement averages for
6 meso claims? Mesothelioma claims?

7 A It's \$108,918.

8 Q And, could you just walk the Court, briefly, through how
9 you -- and what's the total indemnity for mesothelioma claims
10 that were pending at the time Grace went into bankruptcy?

11 A Well, it's the same product of the equation I did before.
12 The number of pending claims, two hundred eighty-eight -- 2885,
13 times the payment rate, 78.3 percent which yields a little over
14 2200 claims that would be paid and they would receive an
15 average of \$109,000, which in later years we forecast they'd
16 pay more, in 2001, they paid a bit less, but essentially, we
17 gradually increased the value, we assumed these claims would be
18 paid in two thousand -- would have been paid in 2002.

19 Q Is that with the one year's inflation is about?

20 A Yes. Well, the one year step-up, in the one of five
21 years, a step-up in the adjustments we did. For this
22 particular model.

23 Q And that results in a total indemnity for mesothelioma
24 claims of what, Dr. Peterson?

25 A It's \$252 million for the unliquidated claims and another

1 \$10 million for liquidated claims.

2 Q And, what is the total liability, for all types of
3 asbestos claims?

4 A Again, I believe this is quite a conservative estimate,
5 but it's \$576 million. And this is similar to the values --
6 remember, we have five different bases for valuing claims,
7 they're all about this number.

8 Q Do you have an opinion as to whether it is likely that the
9 W.R. Grace Company would have been subject to a substantial
10 number of future asbestos personal injury claims?

11 A Oh, it certainly would have had a large number of future
12 asbestos claims. You can't know precisely how much they are
13 right now because they're forecasts, but they would have had a
14 large number of future claims filed against them, but the exact
15 number is imprecise.

16 Q We talked earlier this afternoon about the various
17 components that go into estimating the liability for pending
18 claims. Can you describe to the Court what are the components
19 going into estimating the value of future claims?

20 A Well, again, there are the average settlement -- I'm
21 working backwards, the average settlement values and the
22 percent of claims that get paid, which are similar to what we
23 used for the pending claims, but here we can't simply count the
24 number of future claims, obviously, they're not there, so we
25 have to forecast the number of future claims. So, it's the

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1 three elements, number of claims, percent get paid, values, but
2 here the number of claims is not a count, it's a forecast.

3 Q Does Slide 34 show what you've just described?

4 A Yes.

5 Q Next slide, Slide 35.

6 A Basically the same equation.

7 Q What is Slide 35?

8 A Well, the forecast claims, one of the two key elements in
9 understanding what was going on was, how claims have been filed
10 in the past. Well, just know what the trends were in filing,
11 and where the company left off, basically, the level of
12 claimings at the time it went into bankruptcy and these are
13 annual claim filings, by disease, using the -- where we've
14 allocated the unknown disease claims. And it eliminates the
15 stale claims and the unspecified pending diseases.

16 Q And, what -- does this show Grace's history of number of
17 claims filed against it, divided by disease each year, between
18 the years shown on the chart?

19 A Yes, it does. The last column, the last row in red is an
20 annualized number of the 2001 claims, because they were only in
21 business for, with regard to liability, for a quarter of the
22 year. We estimated what they would have had for the full year
23 by looking at the claims filings over the previous 27 months.
24 But they received 321,000 claims all together. Once you
25 eliminate stale and kind of unknown disease claims that won't

1 get paid.

2 Q Does that -- you said something about 27 months, is that
3 -- by my math, if you multiply -- first of all, how many
4 mesothelioma claims did Grace receive the first quarter of
5 2001?

6 A 566.

7 Q And so why isn't the annualized number of mesothelioma
8 claims as estimated by you in 2001, 2400?

9 A Well, a standard way to do this is just take whatever
10 fraction of the year and gross it up, so here you'd multiply it
11 by four. When we did that, we thought the numbers were too
12 large, we didn't think that the rest of the year would continue
13 to run at the pace of the first quarter, so rather than
14 creating a number for 2001 that we thought was unrealistically
15 high, we looked at -- we basically grossed it up based upon
16 their experience, over not just the last four months but the
17 last 27 -- about three months, but over the last 27 months to
18 develop what we thought was a more appropriate and reasonable
19 gross up number for the year.

20 Q Once you have W.R. Grace's claims history, in terms of the
21 number of claims filed against it year-by-year, how do you use
22 that information to project the future number of asbestos
23 personal injury claims? Could you describe that very briefly
24 to the Court?

25 A Three steps. One with just this, it's -- we look at this

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1 for trends, if trends are going on, you have to expect that
2 those trends will continue to some degree. Here there's
3 external reasons for expecting that.

4 Secondly, we look to the epidemiology which gives us
5 a count in each future year as it has for past years of the
6 number of persons who likely will die from asbestos related
7 cancers. Essentially that's the norm, it's our constant that
8 we can use. The one thing we know about the future, that we
9 have the most confidence in, and third, is to look at the
10 experience of other companies in the years since this company
11 went into bankruptcy. Again, we have eight -- well, at the
12 time I wrote this report, we had six years of experience we
13 could look at to see what likely would have happened to Grace.

14 Q Could I have Slide 36, please? Dr. Peterson, does Slide
15 36 describe the basic concept behind your methodology for
16 projecting future numbers of asbestos personal injury claims?

17 A Yes.

18 Q You've referred several times to epidemiology of asbestos
19 related cancers, what specifically are you referring to?

20 A Researchers at Mt. Sinai Hospital, which is the center of
21 research on asbestos related disease in this country, Mt.
22 Sinai, New York. That's where Irving Selikoff was. Irving
23 Selikoff and his colleagues, primarily Bill Nicholson, did an
24 epidemiological forecast, they looked at all the people who had
25 worked with asbestos in 11 of the major industries where

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1 asbestos was used, for the years prior to 1970s, they had
2 counts of people that were exposed to asbestos, they had
3 estimates of how much asbestos they were exposed to, how old
4 these people were, how long they worked and they combined that
5 with medical models of what's the likelihood of getting an
6 asbestos related disease, given those kinds of factors that I
7 just described. So, based on that, they were able to do
8 separate forecasts for mesothelioma of the number of persons
9 who would die each year from asbestos related mesothelioma, the
10 number of people who die each year from asbestos related lung
11 cancer, the number of people who die each year from asbestos
12 related gastrointestinal cancers. And they published that
13 report in 1982.

14 It remains the best epidemiological forecast
15 available and not only -- that's understating its value, it's
16 an extraordinary scientific event. It is a wonderful forecast.

17 Q Was that published in peer review medical journals?

18 A Yes.

19 Q Could I have Slide 38? What does Slide 38 show, Dr.
20 Peterson?

21 A Well, these are just graphs of the forecasts of the number
22 of people who have died each year from each of these diseases.
23 They made their forecasts in '82 for the years prior to, about
24 1980 or '81, they actually looked at data that they were able
25 to compile from the federal government. Beyond that, this is

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1 all forecasts. So, the blue line is lung cancers, red is
2 mesothelioma, the green is other cancers. And it shows that up
3 until about now, most people who get an asbestos related cancer
4 will get lung cancers, that's changing and now lung cancer and
5 mesothelioma will be about similarly frequent. And they
6 forecast until 2030, but you can extend -- these lines are
7 still well above zero, so you can extend those lines out and we
8 do to 2040.

9 Q Approximately how many mesothelioma claims was Dr.
10 Nicholson and the other researchers at Mt. Sinai projecting for
11 the 2005 to 2010 time frame, on an annualized basis?

12 A It's roughly 3,000 a year in this period. And that's just
13 about the peak. It's slightly lower than the peak year. It
14 peaks and begins to go down a little bit, but still around
15 3,000 mesos a year.

16 Q Have you done anything to test the accuracy of Dr.
17 Nicholson and the other researchers at Mt. Sinai projections of
18 future asbestos related cancer claims?

19 A Yes.

20 Q How did you do that, how did you go about doing that?

21 A The federal government has two different programs for
22 collecting data on the number of people who die from -- who get
23 and die from cancers, various kinds of cancers, from all
24 causes; lung cancer, breast cancer, prostate cancer, and they
25 keep separate records.

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1 The first of these, which is a research that's been
2 going on since the 1960s, I guess, 70s, they collect data from
3 hospices, hospitals, medical facilities to find out how many
4 people died of each of these asbestos related cancers in,
5 originally nine different sites, where the State of Iowa, the
6 whole state's a site, so they go to every one of those
7 facilities in Iowa and collect that data.

8 Long Beach and Los Angeles is a site, so they go to
9 every place there. And they publish that data, they've
10 expanded that site list twice from 9 to 13 to 17.

11 Q Do they collect data about mesothelioma?

12 A Yes. Mesothelioma is one of the categories, it's
13 separately counted and it's useful to us because it's only --
14 the only known cause of mesothelioma is exposure to asbestos.
15 And so, it's a way we can compare their count of mesothelioma
16 claims -- from the nine sites you can extrapolate to the
17 country as a whole. It's a sample. It's not a random sample,
18 but it's a sample. And you can generalize the whole country
19 based upon their nine sites and you can compare that with what
20 Nicholson forecasts in each year.

21 Q You said claims, did you mean disease incident?

22 A I'm sorry, incidents. Actually mesothelioma deaths.

23 Q What does Slide 39 show? Next slide, please.

24 A That makes the comparison. The green line is actually the
25 result extrapolated to the country as a whole for the nine SEER

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1 site study, that's the green line. It goes up and down, bumps
2 up and down a lot because it's from a sample, so it's not very
3 orderly. The blue line is a forecast that KPMG did, attempting
4 to update Manville's -- update Nicholson's study. They did
5 this in 1982, but the red line is actually Nicholson's
6 forecast. And you can see that it just -- it falls right in
7 the middle of the green line for virtually the entire period
8 since Nicholson made his study and published it in 1982.

9 Q Is SEER -- S-E-E-R, the first type of government data you
10 were talking about?

11 A Yes.

12 Q And there's something there on U.S.C.S. meso count it's
13 a little black dot. What's that?

14 A That's another government program that's more recent. It
15 began in the year 2000. Basically, what they've done is,
16 they've taken the SEER method and done it nationally. Now, in
17 every state, except for Maryland, Maryland is a lagger, they
18 don't have it up yet, but for 49 states they do this in every
19 hospital and every hospice, so now they're collecting national
20 data and you don't have to extrapolate to get a national
21 sample, you can count it and you can see the black dots on this
22 graphic it shows why a census of all data is much better than a
23 sample. It's orderly, year after year, the blacks lines, and
24 it also is even more remarkably consistent with the Nicholson
25 forecasts than the SEER data were. This is why I say this is

1 an astounding piece of medical research is because this is a
2 study now that's almost 30 years old. And over that entire
3 period of time and we can check it, it's been confirmed year
4 after year. It's a very reliable forecast. And that's why we
5 use it for forecasting future claims because it gives us a
6 solid basis for starting.

7 Q Once you have Dr. Nicholson's prediction of mesothelioma
8 deaths in the United States and Grace's claims history, how do
9 you go about using those two pieces of data to project the
10 number of future asbestos personal injury claims? And can you
11 describe that very briefly to the Court?

12 A It's simple arithmetic. You divide the number of
13 mesothelioma claims against Grace in a particular year by the
14 Nicholson forecast of the number of people who died of
15 mesothelioma that year, that fraction is the claiming rate,
16 what percentage of people who could make a claim made a claim.
17 And then in turn, now that you've got -- say that a thousand
18 claims for mesothelioma were filed against Grace in the year,
19 and Nicholson forecasts 3,000 mesothelioma deaths, your
20 claiming rate is a third. So, based on that, you can forecast
21 it in the future, you now know what the Nicholson forecast is,
22 in future years, and you multiply it by a third, in order to
23 estimate the number of claims that Grace would get in a year.
24 That's the simple version of it, it's a bit more complicated
25 than that, but that's the heart of what the method is.

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1 Q Does Slide 41 show what you just described, the number of
2 claims divided by the incidences of propensity to sue?

3 A That's the two formulas. The formula for calculating this
4 claiming rate which is know as the propensity to sue, is in the
5 upper -- step one, step two as you take the propensity to sue,
6 multiply it by the incidence of future years in order to arrive
7 at an estimate of the number of projected future claims.

8 Q Do you do that --

9 A And this is -- this is the standard approach that most
10 people do. They may use Nicholson -- or KPMG, although
11 Nicholson is the better source.

12 Q You do that separately for each type of cancer?

13 A Yes. And for each future year, beginning in 2002.

14 Q Did you -- what did you do to take into -- what, if
15 anything, did you do to take into account the trends in Grace's
16 claims history and what we know about what's gone on in
17 asbestos litigation and asbestos claiming since 2001, to
18 project the future number of asbestos claims against W.R.
19 Grace?

20 THE COURT: I'm sorry, I missed something there. To
21 take into account the trends in the debtors' claims history and
22 what we know about what's gone on with what?

23 MR. FINCH: What has gone on generally in asbestos
24 litigation since 2001 to -- first let me back up.

25 Q Did you take into account information, post 2001, about

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1 claims filing trends in order to make a forecast of what would
2 have happened to Grace?

3 A Yes, and would you like me to tell you how we did it?

4 Q I would like for you to tell the Court how you did it.

5 A We -- as I said, the number of claim filings were trending
6 up, substantially, for Grace. The experience of other asbestos
7 defendants since Grace went into bankruptcy is a continuation
8 of the upward trend. Grace anticipated that its claims filings
9 would increase for the reasons that we've discussed. I
10 expected that its claim filings would increase for the reasons
11 that Grace said. Put those all together and it tells us that
12 the propensity to sue that Grace would have been subject to
13 after its bankruptcy, would be higher than it was faced at the
14 time before. And all things, including hindsight, point that
15 that would be the case. The trick is to estimate how much it
16 would increase. And to estimate it, I looked to Manville data.

17 Q What does Slide 43 show?

18 A Slide 43 compares the annual filings against W.R. Grace
19 for mesothelioma from 91 to 2001 and for Manville from '95 to
20 2006. It shows that the Manville claim filings, if you average
21 it for the period after 2001, it's considerably higher than it
22 was before 2001. And it also shows the increasing trend for
23 Grace prior to its bankruptcy.

24 Q Why did you look to Manville as a point of comparison?

25 A Couple reasons. There are really no other good sources of

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1 disease -- of claim filings broken down by the diseases. There
2 are public financial statements by companies that will tell you
3 the total number of claims they received in a year, but they
4 don't break it out by disease. We don't have this kind of
5 information for companies that are still in litigation. But
6 besides that, Manville is generally regarded as, if not the
7 universe of all claims, probably the largest recipient of
8 claims, because Manville was Manville, I mean it dominated the
9 asbestos world. And so, it gets most claims, it continues to
10 get most, but not all claims. So, it's a guide of -- the best
11 guide with an overall universe in trends are, and it's publicly
12 available data.

13 Q Slide 44, please? What does Slide 44 show?

14 A This is just a graphic representation of the prior slide,
15 but it extends the Manville claims back and for me what's
16 important about this is that it shows that prior to the
17 bankruptcy, except for the early 1990s, there was a strong
18 parallelism in the trends in claim filings against Manville and
19 against W.R. Grace, so it suggests that the Grace filings tend
20 to shadow Manville and for all of the reasons that I've
21 discussed, it suggests Manville would be a useful source in
22 expectation, not necessarily with the absolute number of claims
23 would be filed in future years against Grace, but what the
24 trends would be. Just as Manville went up, I expect for this,
25 and all other reasons, that's a way for us to quantify what the

1 rate of increase would have been.

2 Q I noticed in the post -- what does the line signify on the
3 chart, the vertical line?

4 A That's the bankruptcy date for W.R. Grace.

5 Q Okay. I noticed that the red line is flat for Manville
6 going forward, is that what actually happened for mesothelioma
7 filings at Manville?

8 A Well, it goes up until 2003, then it's flat from 2003 on
9 and what we did is, we averaged the filings in 2003, 4, 5 and 6
10 years for which we had data and we did that because in 2003 the
11 Manville trust adopted a new TDP. It changed the nature of its
12 TDP, it tightened the requirements for exposure and for medical
13 diseases. The TDP that basically is in the Grace plan now.
14 Before it was a little easier. As a result of that, and also
15 the values were changed and the payment percentage went down,
16 all kinds of reasons. As a result of that, plaintiffs tried to
17 push claim filings earlier. They did not want to file after
18 the new TDP went into effect, they wanted to beat it. And so
19 there was a spike in claims in 2002 and 2003 in particular, but
20 what that was, is a process called acceleration, it's a common
21 observed event in litigation like this. If there's a deadline
22 or some incentive for a law firm to get a claim in earlier,
23 they'll do it, and here the incentive was to get the old TDP.
24 It's like a bar date. A bar date creates an incentive to get
25 claims in early, to beat the deadline. So, it also produces an

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1 acceleration, any deadline has that affect.

2 Q Using Manville's data, Grace's claims history and the
3 epidemiology done by the researchers at Mt. Sinai, did you come
4 up with a year-by-year projection of future mesothelioma claims
5 against Grace?

6 A Yee, I did.

7 Q Could I see Slide 45? Dr. Peterson, is that your -- what
8 is that?

9 A That's a graphic representation of our year-by-year
10 forecast. The red line to the left is the historic,
11 prepetition claims, the green line is Nicholson's
12 epidemiological forecast, the blue line is our forecast, which
13 starts lower than the actual level of claims they're receiving
14 in 2000 and 2001 because we calculate -- we started with a
15 historic payment rate, propensity to sue, I'm sorry, propensity
16 to sue for Grace based upon three years, 1999, 2000, 2001, so
17 we start at a lower level because it was trending up, that
18 average over three years was lower than its actual number of
19 claims it received in 2000, 2001 and we expect that the rate of
20 claim filings for meso against Grace would go up modestly,
21 parallel to the increase we observed for Manville, between the
22 year 2001 and 2006, but it would never get greater than the
23 number of mesothelioma claims it received prepetition. So that
24 -- and then, thereafter, the number of mesothelioma claims will
25 be dropping in parallel to the declining number of incidents of

1 disease that Nicholson forecasts. That's our higher forecast.

2 Q So -- that is your higher forecast and is it correct that
3 beginning around, maybe, right now or maybe a year or two ago,
4 you were projecting year-by-year declines in the number of
5 future mesothelioma claims against Grace? Not the rate, the
6 number.

7 A The number? Well, I --

8 Q Let me back up. How many mesothelioma --

9 A -- many years ago I might have, not recently.

10 Q How many mesothelioma claims do you project against Grace
11 for the year 2005, roughly?

12 A There's a graphic that shows that. It's around 1500, I
13 believe.

14 Q And how about for the year 2010?

15 A It's less, because the incidence is now going down.

16 Q And how about for the year 2020, is it less still?

17 A I have a table, but I -- it'll be even lower, yes, it
18 would be lower, considerably lower by 2020.

19 Q And does this graphic depicts the future projection of
20 mesothelioma claims?

21 A Yes.

22 Q Next slide, please.

23 A This is the alternative forecast.

24 Q What is this?

25 A This is the alternative forecast, where we just take the

1 average propensity to sue in 1999 to 2001 and say that's going
2 to obtain in the future. It starts lower than Grace was
3 actually experiencing, it never recovers up to its prepetition
4 experience and it just goes down year after year. That's our
5 lower forecast. I don't believe that's nearly as plausible as
6 the first one I showed you.

7 Q Did you do forecasts separately for each asbestos related
8 cancer?

9 A Yes.

10 Q Does Slide 47 show all the cancer claims put together?

11 A It does, it shows several things, for all the cancers.

12 Q Describe for the Court what the several things are.

13 A The green line to the left is the total -- the height of
14 that line is the total number of all of cancers filed against
15 Grace annually, year-by-year. The blue line to the right is
16 the total number we're forecasting for the future. You can see
17 that even -- this, again is my higher model, what I call the
18 best evidence model and even for that model, the future
19 forecasted number of cancers that we have for W.R. Grace is
20 considerably lower than it was prior to its bankruptcy. We
21 forecast -- again, this is conservative. We forecast the
22 number of future claims lower than they were getting before the
23 bankruptcy, even though all these events suggested its
24 litigation position was worsening.

25 Q What does the orange and red show?

1 A That represents the number of compensable claims. When
2 you multiply the number of claims by the percent that get paid,
3 it yields the red line. And here, the red line is the forecast
4 and that's even further below the orange line because we've
5 made two reductions. We're forecasting fewer future claims than
6 they got in the past and among those claims that get filed in
7 the future, we're forecasting that even fewer of them will get
8 paid than the percent prepetition. That's two reasons for --
9 two bases for our conservative forecast.

10 Q Did you do anything to compare the number of non-malignant
11 claims that had been filed historically against Grace with the
12 number of asbestos related cancer claims that had been filed
13 historically against Grace up until the point of the bankruptcy
14 petition?

15 A Yes. We calculated this ratio of non-malignant filings to
16 cancer filings year-by-year. Traditionally, that's a very
17 stable relationship. As cancers go up, non-malignants go up.
18 They tend to go up and down together. And that's been up until
19 recent years, that was a very stable relationship and I
20 calculated it and graphed it.

21 Q What is Slide 49?

22 A That's the graph of it. It shows that -- here we put
23 cancers and non-malignants on a different scale so you could
24 make the comparison easily, but the non-malignants are about --
25 the scale is about nine times bigger and you can see they're

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1 remarkably consistent year after year until 2000 when
2 non-malignants are pulling ahead.

3 Q Did you -- in your forecasting work to estimate the number
4 of future claims that would be filed against W.R. Grace, did
5 you continue that stable relationship going forward or did you
6 do something different?

7 A I changed it, because as I showed on an earlier slide,
8 hindsight told us that this pattern changed rather abruptly
9 beginning in around 2002 and we know why it changed, because of
10 tort reform in some states, because defendants, insurance
11 companies, courts were becoming more skeptical of non-malignant
12 and because a lot of law firms got out of the business of
13 processing big numbers of non-malignant claims. They changed
14 their business models. So, we couldn't go back to this past
15 history and say it was going to obtain in the future, because
16 the world had changed while Grace was in bankruptcy.

17 Q Slide 51, please. What does Slide 51 show, Dr. Peterson?

18 A This shows the result of our changed forecast. You can see
19 here now the blue line on the right, the blue bar on the right
20 is much lower than the historic level of claimings. We assume
21 that the number of claims filed in 2002 against W.R. Grace
22 would be lower than its experience in 2000 and 2001, again,
23 because we're averaging across a longer three year period and
24 the 1999 filings were lower, but then we forecast that every
25 year thereafter, the number of non-malignant claims would go

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1 down and, furthermore, we forecast that only a little over 50
2 percent of non-malignant claims would get paid in the future,
3 in contrast to Grace's past experience when 90 percent, over 90
4 percent of non-malignant claims. So, in effect, it leaves you
5 with a number of compensable, non-malignant claims, at only a
6 little over a quarter of what it was historically. And I think
7 that's the proper forecast, to reflect today's world.

8 Q Slide 52. Dr. Peterson, does Slide 52 summarize your best
9 estimate of the projected number of future claims that Grace
10 would have paid had it stayed in tort litigation?

11 A Yes, it does. It's the table I made mention of earlier.

12 Q And how many mesothelioma claims would Grace be expected
13 to pay going forward from 2001 until the present day?

14 A You can see that on the right side, total is on the bottom
15 row, all the way to the right. There's 22,917 mesothelioma
16 claims. These are future, these are the future non-malignant
17 -- future meso claims including the last two-thirds of the year
18 2001.

19 Q Is that the same number of future mesothelioma claims you
20 were projecting that the Grace asbestos personal injury trust
21 will eventually pay?

22 A Yes. Our forecast of liability for the trust assumes that
23 the same number of claims will be filed against the trust.

24 Q And paid?

25 A No.

1 Q Paid is lower for the trust?

2 A Paid is lower for the trust. And these are, yes, these
3 are actually -- thank you. This is compensable claims I
4 misspoke. Even in the tort system these are the number of
5 claims multiplied by the payment rates, so it's the product of
6 both of those steps. I didn't prepare the table you ask.

7 Q What?

8 A Never mind.

9 Q What is Slide 53? Now that you have the number of
10 projected future claims, what do you do next to come up with a
11 value for Grace's liability?

12 A We have to calculate how much people would get paid which
13 is the combination of what percent get paid and how much on
14 average they get paid. The same as it was for pending claims.

15 Q Does Slide 53 depict those steps?

16 A Yes.

17 Q Does Slide 54 show the percent paid that you use in your
18 estimate of future claims?

19 A Yes. Again, it reiterates what I showed before, the red
20 bars are the two forecasts that we use. We also do
21 calculations and provide it in our report for the historic
22 rates, but I do believe that they would have -- we would have
23 disallowed, rejected more claims.

24 Q And so in your reduced forecast, for example, you're
25 projecting that Grace would pay about 78 percent of the

1 mesothelioma claims?

2 A 78 percent of the mesos and 57.8 percent of the
3 non-malignants.

4 Q You described at some length how you came to an estimate
5 of what values Grace would be paying in the tort system had it
6 not gone into bankruptcy. Does Slide 56 show the results of
7 that work?

8 A I believe -- yes, it does. Well, 56 shows the estimates
9 of how much on average they would have paid for each year from
10 2001 until 2006. Remember, we're forecasting for the period of
11 what Grace would have paid had it remained in litigation, so we
12 assume on average that for meso, Grace would have paid
13 somewhere between 107 and \$111,000 a year for meso. But that
14 amount would have increased over time, so by 2006 and all
15 subsequent years, Grace would have paid, on average for
16 mesothelioma between 188,000 and 225,000.

17 Q What assumptions did you use about the timing and the rate
18 to discount claims back to present value, in your forecast for
19 Grace's liability as of the petition date?

20 A Well, because these liabilities are going to continue to
21 occur and be paid for decades into the future, you have to take
22 into account the present value calculation and inflation. We
23 assume that the values of claims would have increased after
24 2006 when they had reached a fixed amount. We assume that
25 there will be no change in the real value of claims, they'll

1 always have that same value in the future, but they will be
2 subject to monetary inflation at the rate of 2 1/2 percent a
3 year. So, that's one. Then secondly, if you pay a claim in
4 2006 or if you pay it in 2001, when we're present valuing back,
5 you paid \$100,000, Grace would have to actually put aside less
6 money to pay a claim a similar amount ten years later, in 2010,
7 because it doesn't need to put \$100,00 aside in 2001 to pay the
8 2010 claim. It can put aside \$80,000, something like that,
9 earn interest on that and by 2010 it'll have the \$100,000 and
10 that difference between 80, hypothetically and 100 is the net
11 present value of a claim. You calculate that by a net present
12 value -- by a rate of return, a discount rate. The discount
13 rate is the assumption of what Grace could have earned on its
14 income, on its assets, had it set money aside.

15 Q Was the discount rate you used provided to you by a
16 financial expert?

17 A Yes, it was.

18 Q Could you turn to Slide 57?

19 A Yes.

20 Q Are those the assumptions about timing that you used in
21 estimating Grace's liability as of the petition date?

22 A Yes. We assume a 2 1/2 percent CPI of 5.11 percent
23 discount rate and we assumed that claims were to be paid a year
24 after, two years after filing, on average.

25 Q Next slide, Slide 58. What does Slide 58 show, Dr.

1 Peterson?

2 A This puts it all together. The pending liability forecast
3 -- this is for a particular model, we had two different payment
4 rate models, the reduced and the lowest, we had five different
5 value models. We forecast all of them. I think they're all
6 reasonable models, my preferred model is the reduced payment
7 rate.

8 Q And is that present valued or not?

9 A This is not a present valued number.

10 Q Okay. Could I have Slide 59, please?

11 A This is present value that shows -- applying the 5.11
12 discount rate. The total present value of the liability for
13 this particular model is \$5.4 billion, broken down by -- most
14 of that is for meso, \$3.8 billion. Of that, \$550 million,
15 roughly, is for pending claims. There's a big liability that's
16 accrued since the bankruptcy, it's \$2,253,000,000, and we
17 forecast \$2.6 billion for future claims.

18 Q What did you mean that has accrued since the bankruptcy?

19 A The bankruptcy period are the claims that we believe would
20 have arisen between April, beginning of April 2001, through the
21 year 2010. There are claims -- this is period of time that --
22 these are past, or shortly will be past, claims would have been
23 filed during that period of time, they have a value.

24 Q 2009 or 2010?

25 A 2009. Through 2009, thank you.

1 Q And, what is the \$5.4 billion figure shown there?

2 A It's the net present value of Grace's liability for
3 asbestos bodily injury claims.

4 Q As of what date?

5 A As of the date of the bankruptcy petition, April 2001.

6 It's present value back to that date. If you present valued it
7 back to now, it would be a considerably higher number.

8 Q Assuming that Grace stayed in the tort system?

9 A Yes.

10 Q And what is Slide 60?

11 A Slide 60 is just a graphic, showing how the liability gets
12 distributed among diseases. Almost -- 70 percent of the
13 liability is attributable to mesothelioma claims. Like all
14 asbestos defendants, it's the mesothelioma claims that
15 dominate.

16 Q Dr. Peterson, is it possible to precisely determine the
17 actual amount, number and timing of future asbestos personal
18 injury claims?

19 A Not precisely, no.

20 Q Are forecasts like yours subject to some uncertainty?

21 A Yes.

22 Q Are there various ways to address this uncertainty?

23 A Yes. There's one primary way that most people use.

24 Q And what is that, how did you do it?

25 A Sensitivity analysis. That's what most people use.

1 Sensitivity analysis says, okay, various elements of this
2 forecast are uncertain. Whether you use the Nicholson or the
3 KPMG epidemiology makes a difference. How much difference does
4 it make? You run the forecast, changing only that factor, from
5 Nicholson to KPMG, you compare the results and that tells you
6 how the result is sensitive to variation on that factor. And
7 so we ran sensitivity analyses varying about a dozen factors,
8 one at a time.

9 Q Could you see Slide 62?

10 A Yes.

11 Q Does Slide 62 list some of the various sensitivities that
12 you analyzed and estimated?

13 A Yes. It raises the issue. For a number of these there
14 are multiple sensitivities, but this is all the list of factors
15 that we vary for the sensitivity analysis.

16 Q And depending on what analyses, sensitivity analyses, you
17 use what is the range of expected liability for W.R. Grace as
18 of the bankruptcy petition date?

19 A It's 3.7 to \$6.8 billion. I wouldn't regard each of these
20 alternatives as reasonable. They're just variations to see
21 what if things changed.

22 Q Would you regard your best evidence model as reasonable?

23 A That's a reasonable model.

24 Q Did you do any estimate of Grace's liability under
25 different scenarios than what its liability would be as of the

1 bankruptcy petition date?

2 A Yes, two. Two different variations.

3 Q What were those two scenarios?

4 A Well, we first looked at what would be the liability under
5 the TDP.

6 Q And without describing the second one, what was the second
7 one?

8 A The second one was what if there were no TDP and no trust
9 and Grace came out of bankruptcy and had to resolve all of
10 these claims now back in the tort litigation system.

11 Q How did you go about estimating the liability of the Grace
12 524(g) Trust that will be created and use the TDP if this Court
13 confirms this plan of reorganization?

14 A It's the same basic approach. It's the number of claims
15 times how many get paid and how they get -- how much on average
16 they get paid, although there is a bit of variation because the
17 TDP is a little more complex. But, we start with the number of
18 claims which are the same numbers. It's no different than our
19 tort forecast. We assume that whatever claims would have been
20 filed against Grace in tort will get filed with the Trust.

21 But, there are eight different Trust distribution
22 categories, as opposed to the four diseases. There's meso --
23 all mesos -- there's only one meso category in the TDP, but
24 there are two lung cancers, there are four non-malignant
25 categories and so we have nine I guess altogether so --

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1 categories altogether. So, we had to make estimates of how the
2 lung cancer and mesothelioma would distribute among these
3 various categories, as well as there's a ninth category which
4 is a cash discount payment. It's a \$300 basically token
5 payment for someone that can show they have a cause of action,
6 but really can't meet any of the criteria for payment under any
7 of the diseases and moreover they can't -- under IR we don't
8 expect they would be able to qualify even under that.

9 Q What does Slide T-9, T as in turtle 9, show, Dr. Peterson?

10 A This summarizes the differences in the forecast for the
11 tort analysis as opposed to the trust.

12 Q And in doing that analysis did you also provide that
13 estimate of liability to the Grace ACC and the FCR for
14 non-litigation purposes, the liabilities of the trust?

15 A Yes. It was used, among other things, in estimating a
16 range of payment -- the payment percentage that the trust would
17 be able to -- probably be able to pay on a pari passu basis.

18 Q Turn to Slide T-10. Dr. Peterson, does Slide T-10 show
19 what your estimate is of what the Grace Trust's liability would
20 be if this bankruptcy plan is confirmed and it resolves claims
21 through the TDP?

22 A Yes.

23 Q And what is that estimated liability?

24 A Well, it ranges at a high from \$9.3 billion to 6.3, but
25 using the rates of percentage of claims that would be rejected

1 by Grace historically in tort or by the trust, the reduced and
2 the lowest which I think are the two better models, it ranges
3 from \$7.4 billion to \$6.3 billion.

4 Q You describe that another scenario you did in addition to
5 the liabilities of the trust, do you recall describing very
6 briefly?

7 A Yes, I mentioned that.

8 Q Describe what that estimate of liability is and if it's
9 shown on this page.

10 A Yes, it is, it's on -- the setting is called tort. It's
11 at the bottom of the table. Basically again, we started with
12 the same number of claims and we said what if there were no
13 TDP, there were no trusts -- there may or may not be a trust,
14 but there were no TDP for it to use -- and someone had to deal
15 with these liabilities, but -- so they would presumably go back
16 into the tort litigation system as of 2009 or 2010. So, all of
17 the claims we forecast that would have accrued through now
18 would be there and available to be -- would have to be
19 liquidated and that's the basis for the forecast at the bottom,
20 again using our three different payment percentage -- our
21 payment rates and our five different estimates of what the
22 current values of claims are.

23 Q And what is the net present value date, if you will, that
24 that forecast is pegged to?

25 A Well, now -- this is what someone would do now, like the

1 trust we're net present valuing. Our trust analysis and this
2 analysis, NPVs to an estimated day for an effective date of the
3 plan I think we have the beginning of 2010 as the estimate.
4 And so these are present valued back to the current date
5 because we're interested in what -- this is really in
6 consideration of the feasibility, the capability of resolving
7 claims, (1) under the trust, or (2) without a trust, and so we
8 need to look at what you can do today.

9 Q And what is the net present value of the liability that
10 whatever entity inherits the Grace liability would face if
11 instead of the TDP in place it was put back in the litigation
12 system?

13 A Well, again, assuming that the timing of payments would be
14 the same in the trust or by this tort system, which is what I
15 have here, the liability would range anywhere from -- well,
16 here I think if you went back into litigation I don't think the
17 reduced or the lowest payment rates are any longer appropriate.
18 You wouldn't have the trust there to be able to examine claims
19 so you would be -- the trust that the -- whoever has to pay
20 these claims would be basically back in the shoes that Grace
21 was in 2001, but in far worse shape because it now would face
22 over 400,000 claims in the first year or so. Grace never had
23 to face that and deal with that. They wouldn't have the time
24 to discriminate a bunch of claims so we used the historic rate
25 of payment and under the historic rate basically it's about \$10

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1 billion. It ranges from \$9.2 billion to \$10.7 billion.

2 Q Is that billion with a B?

3 A Billion with a B.

4 Q Does Slide T, as in turtle, 10 show that?

5 A It shows that under the historic column to the left. I
6 think again that's an underestimate because timing will be
7 different. If this happened, claims would -- I described the
8 acceleration process earlier. If this happened law firms would
9 clamor to get their claims in because they would be concerned,
10 one, they don't want to be the end of the cue of 400,000 plus
11 claims. This trust --

12 MR. KOVACICH: Your Honor, I object. First of all,
13 the answer goes beyond the question that was asked.

14 DEPUTY CLERK: Your name, please?

15 MR. KOVACICH: Mark Kovacich for the Libby Claimants.
16 The witness is now providing testimony about matters that were
17 not disclosed in any of his reports. These figures appear in
18 his report under a scenario described as Grace dealing with its
19 tort liability in the absence of a trust. Nothing in his
20 report talks about these matters he's going into now, which
21 include an acceleration of claims and other things that the
22 witness began to discuss about what would happen in the absence
23 of the trust.

24 THE COURT: All right, it's sustained.

25 MR. FINCH: Could I have the question back first and

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1 we'll do this in pieces?

2 (Question replayed)

3 Q Dr. Peterson, what is your estimate of the net present
4 value of the liability or whatever entity inherits the Grace
5 liability would face if this plan were not confirmed?

6 MR. KOVACICH: I have an objection to that question,
7 as well, with the qualification that the objectionable part of
8 the question is Mr. Finch's language of whatever entity. This
9 whole discussion in Dr. Peterson's report relates to Grace's
10 liability in the tort system.

11 THE COURT: That's sustained.

12 Q What liability would Grace face absent this plan in TDP?

13 A It would range between \$9.2 billion and \$10.7 billion.

14 Q And in your report -- that table is set forth in your
15 March 2009 expert witness report, is that right, Dr. Peterson?

16 A This table is set forth in my report and the year by year
17 backup analysis was provided to the parties.

18 Q In your Exhibit Book, Page 201 -- excuse me -- Tab 201,
19 you'll find your March 2009 report.

20 A I have that.

21 Q And does that table appear on Page 17 of your report?

22 A Yes, the table that's up there is Page 17.

23 Q Does that include defense costs at all?

24 A No.

25 MR. FINCH: Pass the witness, Your Honor. Actually,

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1 Your Honor, before I pass the witness may I offer for
2 demonstrative purposes only the slides from Plan Proponent's
3 Exhibit 178b that Dr. Peterson talked about. We only discussed
4 with him a subset of the slides and what I'd like to do is once
5 we have the transcript is submit to Your Honor the slides that
6 he discussed. I have a pretty good list right here, but rather
7 than being imprecise about it and taking up the Court's time
8 may I proffer a new Exhibit 178b for demonstrative purposes
9 only that shows just the slides that were shown to Dr. Peterson
10 that he discussed in his direct examination.

11 THE COURT: All right, they're accepted as
12 demonstratives and yes, you can file a revised Exhibit 178b.

13 MR. FINCH: Thank you, Your Honor.

14 MR. BERNICK: Could we just have a couple minutes,
15 Your Honor?

16 THE COURT: Yes, we'll take a ten minute recess.

17 (Recess)

18 THE COURT: Okay, I guess they don't want to come in
19 so are you ready, Dr. Peterson?

20 THE WITNESS: I am ready.

21 THE COURT: All right.

22 THE WITNESS: Thank you.

23 CROSS EXAMINATION

24 BY MR. BERNICK:

25 Q Dr. Peterson, I want to pick up where Mr. Finch left off

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1 just very briefly and I want to direct your attention to two
2 slides that you've shown and then a couple other documents that
3 relate to the expert work that you've already done and that
4 you've already disclosed to the other side. And I first want
5 to begin with Slide 59. And I think we can show it to the
6 Court. Slide 59 is the present value of pending and future
7 claims against Grace, best evidence model reduced payment
8 rates, did I get that one right?

9 A Yes.

10 Q So, does this now take all future -- all present and
11 future and measure the NPV as of '01?

12 A Yes.

13 Q And the total number there is what?

14 A Total is 5.4 billion.

15 Q Now, if we wanted to do the calculation of all present and
16 future, not back to '01, but back now to where we are to date
17 as if we were sitting here today, and now embark upon the
18 process of paying all these claims wherever they might have
19 arisen, but today they get paid and we did the NPV as of '09,
20 is there another slide that you already have and have already
21 shown to the Court that shows what happens to the NPV?

22 A Yes.

23 Q Directing your attention to Slide T-10, does this give us,
24 in the numbers that appear for tort, the range of NPVs that
25 would result?

1 A Yes.

2 Q And what accounts for the very significant difference that
3 we see when we talk about all present future between NPV '01
4 and NPV '09?

5 A There are a couple of differences. One is the net present
6 value date is a very significant issue. Net present valuing it
7 back to the current time creates a much higher liability
8 because whoever as payees would have lost the interim eight
9 years of income that they could have earned on their assets.
10 Also, there are slight technical issues with regard to the
11 values of claims. The pending claims have a greater liability
12 here because they're valued at basically what the 2006 -- the
13 current value, whereas some of the claims were valued by
14 earlier -- remember, there's a step-wise increase -- they were
15 valued lower and that's another difference. Those are the --
16 and then there's the model you choose. I mean, I've said that
17 I believe that were the current hypothetical that you asked
18 about the case that you'd have to use the historic payment rate
19 and that creates a higher liability.

20 Q Okay. But, if we kind of talked about a real world just
21 very simple deal, we're sitting here in '09, none of the claims
22 that you have forecasted as either being current or future have
23 been paid, at all.

24 MR. KOVACICH: I object, Your Honor, this is leading.

25 COURT CLERK: Use the mic, please.

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1 MR. BERNICK: I'm asking him to make an assumption
2 for purposes of a hypothetical.

3 MR. KOVACICH: Mark Kovacich for the Libby Claimants.
4 This whole examination is leading.

5 Q I want you to assume a certain hypothetical.

6 A All right.

7 Q The hypothetical I want you to assume is that none of the
8 claims have been paid, current or the ones that have accrued
9 all the way through to date, none of them had been paid.

10 A All right, I understand that.

11 Q I want you now to assume that they all get paid as they
12 are available to be paid and they're paid current and future
13 tort system values. I want you to make that assumption.

14 A Yes.

15 Q Is that assumption consistent or inconsistent with the
16 scenario that you have here that you've already calculated at
17 nine to ten billion?

18 MR. KOVACICH: Objection, this is not part of the
19 disclosure. The nine to ten billion figure comes from Dr.
20 Peterson's analysis of Grace's liability were they back in the
21 tort system. Mr. Bernick is now asking him to compare it with
22 the 5.4 which was from his estimation report and it's a
23 different numerical analysis.

24 MR. BERNICK: Judge, this is already in evidence.
25 He's already testified about it and all that he's done.

1 THE COURT: He has. This assumption is a proper
2 assumption to explain the values that appear on Exhibit T-10.
3 And I think it's been asked and answered anyway, but okay it's
4 a proper hypothetical.

5 Q Is my hypothetical the same or different as the number --
6 as what is captured by the number of nine to ten billion that's
7 already appeared at T-10 in your report?

8 A Your hypothetical -- all the elements of your hypothetical
9 are captured by and consistent with and the same as the
10 analysis on Page T-10 for tort.

11 Q Now, I want then to capture and go back to 58 for a
12 moment. And now I want to go within this number. This number
13 is NPV '01, but it's got a couple components that you've
14 already testified to. You have pending in bankruptcy period
15 and then you have future, and future refers to 2010 plus. And
16 we have separate figures for that, right?

17 A Yes.

18 Q If we wanted to capture as of '01 the NPV of all claims
19 that would come in all the way through -- up to 2010, that is
20 through the balance of '09, what would be -- according to that
21 table as already set out, what would be the NPV as of '01?

22 A Well, it would be the sum of the pending liability --
23 liability for pending claims, plus the bankruptcy period.
24 That's actually shown on Page 59.

25 Q Okay, I'm sorry, did I say 58? I meant --

1 A Yes. It's Page 59.

2 Q So, what's that number?

3 A Just a second, I got to do the arithmetic. It's two
4 billion eight hundred million dollars.

5 Q Two billion what?

6 A Eight hundred million.

7 MR. KOVACICH: I'm sorry, Page 59?

8 A Yes, if you add -- counsel, if you add the pending in
9 bankruptcy you add 549 for pending and 2253 for the bankruptcy
10 period.

11 Q Now, if we then wanted to find out the same kind of thing,
12 which is if you now take that number and say okay they were not
13 valued as of '01, but they get valued as of '10 would we see
14 the same relationship, that is 5.4 roughly is doubled, would we
15 see 2.8 roughly double?

16 MR. KOVACICH: Objection, this is a brand new opinion
17 we've never seen anywhere before.

18 MR. BERNICK: No, not -- to the contrary. It's right
19 in his report. All we're doing is taking exactly the same
20 relationship. It's just an NPV.

21 MR. KOVACICH: He didn't do that in his report, Your
22 Honor.

23 MR. BERNICK: Well, there -- you can -- the reports,
24 Your Honor, he's got thousands of numbers and in his report he
25 specifically -- I'm sorry, I didn't understand that. He

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1 specifically addresses the difference between the pre and post
2 2010 period of time. It's right flat out in his report. And
3 he also addresses the effect of the NPV. It's right flat out
4 in his report.

5 THE COURT: Can you just point me to where so I can
6 make a ruling on this, Mr. Bernick?

7 MR. BERNICK: Yes, at Page 59.

8 THE COURT: Of Exhibit -- I'm sorry, I had it here.
9 Just a second.

10 MR. BERNICK: Of this exhibit. And I will further
11 show Your Honor where it comes from materials that were
12 specifically disclosed.

13 THE COURT: In Exhibit 201?

14 MR. BERNICK: Yes.

15 THE COURT: All right.

16 MR. BERNICK: The difference between pending and
17 bankruptcy pre 2010 and post 2010 is a distinction that is
18 specifically made. And he then also takes and makes -- on the
19 basis of that distinction he also then when he makes
20 calculations make calculations that are both '01 calculations
21 and '09 calculations and you see that at T-10 he makes the '09
22 calculation that directly corresponds to the 5.4 calculation on
23 59. So, it's all there.

24 And where does it come from? It comes from materials
25 that were disclosed. This is an e-mail. This is Plan

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1 Proponent's Exhibit 234. Just before Mr. Peterson was deposed
2 in connection with this confirmation hearing an e-mail was sent
3 out to Mr. Cohn and to others -- Mr. Heberling and Mr. Cohn,
4 specifically disclosing the tables that were used to compile
5 all of these values and they break out for every year how much
6 is being spent and into the future, and here we have 2010
7 through the future. That's the line item. So, all that he's
8 done is to take these tab runs from materials that were
9 specifically disclosed before his deposition was taken.

10 MR. KOVACICH: May I respond, Your Honor? The
11 materials Mr. Bernick is talking about relate to Dr. Peterson's
12 estimation report and the \$5.4 billion figure the \$2.8 billion
13 figure, I don't have a problem with that. The nine to ten
14 billion dollar figure that Mr. Bernick has written on his board
15 over there relates to the separate analysis of what Grace's
16 liability would have been back in the tort system and there was
17 nothing in that analysis or the 2009 report which separated out
18 payments by year in order to make a comparison of past and
19 future claims within that number.

20 MR. BERNICK: That's not true. These are all the --
21 all these reports that I'm talking about are all of them, tort
22 system values. There's not a single -- I can ask the witness.

23 Q Are all these numbers tort system values?

24 A Yes.

25 MR. KOVACICH: They're two different sets of numbers,

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1 Your Honor. And we maintain our objection that any attempt by
2 Dr. Peterson to offer an opinion using the nine to ten billion
3 dollar figure relating to the analysis he did of Grace's
4 liability in the tort system for purposes of comparing it to
5 the TDP was never disclosed.

6 MR. BERNICK: I didn't compare it to the TDP. This
7 has nothing to do with a comparison to the TDP.

8 MR. KOVACICH: And I'm --

9 THE COURT: No. I think it's a question as to
10 whether or not the same ratio will apply.

11 MR. BERNICK: Yes.

12 THE COURT: In the event that you're doing a net
13 present value calculation back to 2001 and then you do it again
14 as of 2010, there is a difference and the witness has explained
15 why largely, but not totally based on the fact that the debtor
16 would have been investing dollars to pay that liability. Those
17 dollars plus the interest factor would have accumulated and so
18 the NPV currently is higher than the NPV would have been back
19 in 2001. And he's asking whether the same ratio would apply
20 with respect to whatever -- I've lost the question, I'm sorry
21 -- whatever the \$2.8 billion is. I don't remember the
22 question, Mr. Bernick, I'm sorry.

23 MR. BERNICK: The 2.8 billion was -- again, going
24 back to Slide 59, the 2.8 billion is the portion of the '01 NPV
25 number that is driven by the pending claims that were both

1 pending at the time of the 11 being filed --

2 THE COURT: Okay.

3 MR. BERNICK: -- and have accrued during the
4 bankruptcy. It excludes future claims.

5 THE COURT: All right. So, the only question is
6 whether the same ratio is going to apply.

7 MR. BERNICK: Yes.

8 MR. KOVACICH: Your Honor, it's not the only
9 question. They're mixing two different sets of numbers here.

10 MR. BERNICK: They're the same sets of numbers, Mark.
11 They're all tort system numbers.

12 THE COURT: I'm not clear where they're mixing two
13 sets, Mr. Kovacich.

14 MR. KOVACICH: My understanding of the numbers in the
15 e-mail to Mr. Cohn was, they related to the values in Dr.
16 Peterson's 2007 estimation report. With the nine to ten
17 billion dollar figure they're talking about his analysis of
18 what would be Grace's liability in the tort system if there
19 were not a trust, and he did not do any separation --

20 MR. BERNICK: I'll make it easier. I won't even
21 refer to it.

22 Q Just based upon the numbers that were put in the tables
23 that were just shown to the witness which make the
24 differentiation between all and current through two thousand --
25 or up through 2010 -- and that's right out of those same pages

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1 -- all tort system -- this is not designed to compare with the
2 TDP -- all tort system, we have '01 NPV for all is 5.4 billion,
3 Dr. Peterson?

4 A Yes.

5 Q '09 NPV for all is nine to ten billion?

6 A Yes.

7 Q If we take the -- based upon Page 59 if we just take the
8 currents through the point of -- through today, essentially,
9 the NPV would be tort system 2.8 billion?

10 A Yes.

11 Q And what would be the NPV based -- does the NPV now for
12 the pre '10 claims -- does the NPV for that bear roughly the
13 same relationship as the NPV for the all.

14 MR. KOVACICH: I'm going to object, Your Honor. I
15 won't belabor this. This is an opinion that was not disclosed.
16 I don't have to continue arguing, but I want my objection noted
17 for the record.

18 THE COURT: All right, your objection is noted. It's
19 overruled for the reason that if the same calculations are used
20 and the same number factors are used, the answer to the
21 question has to be self evident. So, to the extent that it is
22 a mathematical calculation I don't think it takes an expert
23 witness to offer an opinion, but the witness can certainly
24 state as a matter of fact whether a math calculation would lead
25 to that result, and he's clearly competent to do that. So, the

1 objection is overruled.

2 Q Sir?

3 A Yes, you can do that. Sitting here I've done it.

4 Q I'm sorry?

5 A Sitting here -- you can do it and I've done it.

6 Q Yes. What's the answer?

7 A Well, the \$10 billion would be about \$5 billion \$200
8 million, and the nine billion would be about \$4.7 billion.

9 Q Okay.

10 A I'd put some caveats on it, but we may not want to go
11 there.

12 Q Well, I'm sure Mr. --

13 MR. KOVACICH: I'm sorry, counsel, I wouldn't stand
14 up here, but I don't have a microphone.

15 MR. BERNICK: No, that's all right. Let me then go
16 on and get the last thing and if he wants to pursue the caveats
17 that's fine.

18 Q I now want to take a look at this one number here, which
19 is 4.7 to 5.2 billion NPV as of this year for all claims filed
20 prior to the time or accruing up to the time -- not accruing --
21 filed, made, up through the time that we're here now in the
22 confirmation hearing. I want to ask you whether that number is
23 effective, that is, whether that number reflects the impact of
24 what you've previously testified to and is in your expert
25 report and it is the following -- this is from your expert

1 report, Plan Proponent's 19, is that right?

2 UNIDENTIFIED ATTORNEY: 199.

3 Q 199 -- in your expert report you talk about and you
4 actually explain it -- this curve here and you also talked
5 about this, I recall on Mr. Finch's examination of you, do you
6 remember talking about this curve here?

7 A Which --

8 THE COURT: We can't see what curve you're pointing
9 at.

10 MR. BERNICK: Oh, I see.

11 A I have no idea.

12 Q Yeah.

13 A Do you have a page number in the report?

14 Q Yes, the page is Number 72.

15 A All right, I have 72.

16 Q It's not the right one. Is it in your deal? Is it all in
17 this thing? I think -- I think you testified about 44 -- Page
18 44 of your presentation. Is that the same thing as what we
19 have in your report as Figure 22?

20 A Well, the number of -- the total number of Grace meso
21 claims --

22 MR. KOVACICH: I object. I don't think there's a
23 question pending.

24 MR. BERNICK: This is really -- just do it.

25 Q Page 44 of the presentation that you made, do you see that

1 that's mesothelioma propensities to sue increase --

2 A Oh I'm sorry, I was on the wrong Page 44. In the
3 demonstratives you're asking about.

4 Q Yeah. In the presentation that you made, which is --

5 MR. BERNICK: -- exhibit what, Nate?

6 A Yes.

7 MR. FINCH: Exhibit 198b, as in basketball.

8 Q 198b --

9 THE COURT: 178.

10 MR. FINCH: 178b, as in basketball

11 Q -- 178b as in basketball?

12 A Yes, I have that.

13 Q We're trying the Court's patience here with numbers. It's
14 178b as is basketball.

15 THE COURT: No, that's not what tries my patience. I
16 don't mind numbers.

17 MR. BERNICK: Oh well.

18 Q Page 44, the chart there, you talked about the
19 propensities to sue and you have a note Grace filings in 2001
20 are annualized over the 27 month period. Is that the same
21 chart that's in your expert report at Page 72?

22 A Yes.

23 Q Okay. And when you displayed this chart here today as
24 Page 44 I believe you made a statement concerning acceleration.
25 Do you recall your testimony regarding acceleration?

1 A Yes, I do.

2 Q And just so that we can get a point of reference, what did
3 you say about acceleration as concerns this curve?

4 A On Pages 44 I said that acceleration had occurred in the
5 Manville filings of 2003 to take advantage of the 1995 TDP and
6 so than the actual 2003 filings of meso with Manville Trust
7 were higher that I showed here, but they were lower in
8 subsequent years as a result of the fact that the claims that
9 would have been filed in 2004 and 5 and 6 were accelerated
10 earlier, so that's why we averaged them in order to get a
11 straight line.

12 MR. FINCH: Dr. Peterson, you said 1995 TDP. Did you
13 misspeak?

14 Q 2003 TDP? 2004?

15 A No, the asbestos -- Manville claimants wanted to be able
16 to take the 1995 TDP and avoid the 2003 TDP.

17 Q Okay. So what you're saying is in fact on this chart,
18 which was Page 44 in your presentation, what actually happened
19 was that there was an acceleration and then it came down?

20 A Yes, that's what happens with an acceleration, you're
21 borrowing claims from the future in effect.

22 Q Okay. And so really what happened was that there was a
23 break point, people knew that a new TDP that was less flexible
24 --

25 A Less attractive.

1 Q Less attractive.

2 MR. KOVACICH: I object to the leading questions.

3 THE COURT: All right, sustained.

4 Q The new TDP that you're referring to took effect when?

5 A 2003. September 2003.

6 Q And in fact what did you observe in the claims trend of
7 Manville that related to that new TDP?

8 A Your peak in 2003 is right, but the blue line would drop
9 below the red line. It goes below the average so --

10 Q Did I get that right now?

11 A That's representative. It's not accurate.

12 MR. BERNICK: You can see one of my other efforts
13 right behind you that I've heard a lot of feedback on.

14 THE WITNESS: I've heard some of that, too, yes.

15 Q So and then your testimony is that this relates to the
16 concept of acceleration?

17 A Yes, that's demonstration of acceleration.

18 Q Driven by the fore -- the pre-announcement of an event --

19 MR. KOVACICH: Objection, leading.

20 THE COURT: Sustained.

21 DEPUTY CLERK: Your microphone is not on.

22 MR. BERNICK: My microphone is not on? Okay.

23 Q In fact, tell us whether or not this concept of
24 acceleration that you've testified to, was that or was that not
25 in your expert report in this case?

1 A It was.

2 Q Okay. Now going back to the number that we've talked
3 about, you showed in your slide about the claims in the tort
4 system value of claims that would have been filed against Grace
5 in the tort system up through the date where we are today, this
6 number here 2.8 billion NPV '01, and then 4.7 to 5.2 billion,
7 '09 and '10, are these numbers -- are these numbers adjusted in
8 any way, shape or form to reflect an acceleration if there was
9 to be an acceleration that would take place in connection with,
10 let's say in 2009?

11 A They have no provision for acceleration and that was one
12 of the caveats that I would have mentioned.

13 Q Okay. And could you explain that to us?

14 A That because if bad things are going to happen if you wait
15 to file a claim lawyers will file claims earlier. That was
16 true with regard to the Manville 2003 TDP. It would be true
17 with regard to this large number of claims being put back into
18 some undefined process for payment. Lawyers would want to
19 avoid being at the tail end or being excluded from that
20 process. They would be sure to file their claims early to get
21 them in so that they could take advantage of what money, if
22 any, might be available to pay claims in this process that
23 we've been talking about of W.R. Grace being responsible now
24 for all these claims without the trust.

25 Q In your expert report do you make a disclosure of what the

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1 effect of acceleration would be or is when it occurs? What
2 does acceleration do?

3 MR. KOVACICH: I object. The question is not clear
4 there is discussion of claims acceleration related to the
5 Manville experience.

6 MR. BERNICK: That's what I'm talking about.

7 Q What did acceleration do in the Manville case?

8 A Can I answer?

9 Q Yeah, go ahead.

10 A Acceleration is a general term that I first applied in the
11 fibreboard trust -- fibreboard litigation in the early
12 nineties. It's the idea that when there's a deadline that
13 claims -- it borrowed from the future. Claims that would
14 otherwise have been filed in the future get filed earlier in
15 time and it has two effects; it increases the number of filings
16 preceding the deadline and it depresses the filings after the
17 deadline because those claims have been filed. This is not a
18 formal deadline, but it is an informal deadline because
19 plaintiffs and plaintiff's lawyers would understand that there
20 are serious consequences of not getting a claim filed right
21 away even if there were no bar date.

22 Q Is a bar date a formal event that would be associated with
23 acceleration?

24 A Yes. And that's why as a forecaster I don't like bar
25 dates.

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1 MR. BERNICK: That's all I have. I pass the witness,
2 Your Honor.

3 THE COURT: Good afternoon.

4 MR. CASSADA: Good afternoon, Your Honor. Good
5 afternoon, Dr. Peterson.

6 THE WITNESS: You're the head of a cue here, yes.

7 MR. CASSADA: I'm Garland Cassada. I believe we've
8 met before.

9 THE WITNESS: Yes, we've met many times. Good to see
10 you again, Mr. Cassada.

11 MR. CASSADA: Pleasure to see you.

12 CROSS EXAMINATION

13 BY MR. CASSADA:

14 Q I'm representing Garlock Sealing Technologies, the
15 codefendant in the tort system.

16 A Thank you.

17 Q I have a few questions about your report. First of all, I
18 gathered from your report that it would be fair to say that
19 Grace as of the date of its bankruptcy case was a highly
20 targeted asbestos defendant, is that correct?

21 A It had become a targeted defendant. It would have become
22 a more highly targeted defendant in the future.

23 Q Can I ask you to look at -- I believe your estimate report
24 is Plan Proponent's Exhibit 199, is that correct?

25 A Yes, I believe that's correct.

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1 Q I'm going to ask you to look at Table 33, which I believe
2 is a summary of your projected propensities to sue for various
3 asbestos related cancers.

4 THE COURT: Page 87, Table 33?

5 THE WITNESS: I'm sorry, Table 33, Page 33.

6 THE COURT: Oh Figure 33. I'm sorry.

7 MR. CASSADA: No, it would be -- I think it's called
8 Table 33.

9 THE WITNESS: Do you have a page number?

10 MR. CASSADA: Yeah, I believe it's --

11 THE COURT: Table 33 is on Page 75.

12 THE WITNESS: Thank you, Your Honor. I have that.

13 THE COURT: That's Figure 33, not Table 33.

14 THE WITNESS: Page 75. Counsel, you wanted Table 33,
15 which is the table of propensities to sue by year, is that
16 correct?

17 MR. CASSADA: Yes.

18 Q I wanted to understand your forecast for the propensities
19 to sue for mesothelioma, lung cancer and other cancers going
20 forward. Can you see that -- Table 33 I believe is Page 175 of
21 your actual estimate report.

22 A Page 75. Yes, I have that.

23 Q Okay. And there you have -- that table is divided up into
24 actual and propensities to sue in your forecast, correct?

25 A Yes.

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1 Q I believe you testified that for your propensities to sue
2 you relied on the Selikoff Nicholson incidents model as opposed
3 to the KPMG?

4 A Yes.

5 Q And you prefer that one because that one is more in line
6 with SEER and the other government report that you've
7 described?

8 A Yes. The empirical evidence shows it's a better
9 scientific model.

10 Q Okay. Did Selikoff Nicholson purport to forecast the
11 incidents of occupationally caused asbestos related diseases?

12 A That's exactly what it is, it's occupationally caused.

13 Q And SEER, does SEER give the actual incidents --

14 A Yes.

15 Q -- of occupationally caused diseases or diseases in the
16 population as a whole?

17 A It's the population as a whole.

18 Q Okay. So there may be some within SEER that are -- there
19 may be additional cancers in SEER that wouldn't have been
20 predicted by the Nicholson -- Selikoff Nicholson then?

21 A To the degree that there are a few non occupationally
22 caused mesotheliomas or lung cancers or so on related to
23 asbestos -- well actually meso, not lung cancer -- they would
24 be over and above what Nicholson forecasts, but they would be
25 counted in SEER, yes. It's not -- I would not regard that as a

1 significant issue.

2 Q Okay. And the other report that a lot of experts rely on
3 is the KPMG report?

4 A Yes.

5 Q I believe in fact your Exhibit 199, your report, you have
6 attached to that as Appendix C, you've got both the Selikoff
7 Nicholson incident report going forward as well as the KPMG
8 report?

9 A Yes.

10 Q And have you yourself relied on KPMG in the past?

11 A There was a period of time in the late nineties when we
12 were improperly adjusting SEER data and at the time I thought
13 that the Nicholson forecast was better, but -- I Mean the KPMG
14 forecast was better. It turns out with the 2000 census data
15 and the correct adjustment that Nicholson was always better.
16 It was my error.

17 Q Okay. Moving forward -- and I'm looking at Table 33 at
18 propensities that you forecast going forward from 2002 to 2007,
19 and you have 2007 plus, and I gather that the propensities to
20 sue are constant for 2007 and years after.

21 A Actually they're constant from 2006 and after. I just
22 added 2007 to show that.

23 Q I see. I see that. Now, you say that the propensity to
24 sue by persons who suffer from mesothelioma would be 46.1
25 percent?

1 A In the year 2006 and thereafter, yes.

2 Q Okay. Now does that mean that all persons who are
3 diagnosed -- that of all persons who are diagnosed with
4 mesothelioma in a given year that 46 percent of those will sue
5 Grace?

6 A That's what that means, yes.

7 Q Okay. And the same would be true for lung cancer, only 35
8 percent of all persons diagnosed at least with asbestos caused
9 lung cancer would sue Grace?

10 A Well, it's really a count. We forecasted the number of
11 lung cancers filed in 2006 and each subsequent year would be
12 equal to 35 percent of Nicholson's forecast of how many of
13 those would be asbestos related.

14 Q And with respect to other cancer the propensity -- the
15 forecast propensity is 45.6 percent?

16 A Yes, with the same description that I applied to lung
17 cancer.

18 Q Okay, thank you. Let me ask you about the payment rates
19 that you testified about earlier.

20 A Actually, Mr. Cassada, let me -- I have to clarify my
21 answer for meso if I can.

22 Q Yes.

23 A The 46 percent is the same, it's the forecast of the
24 Nicholson -- it's a multiplier times the Nicholson
25 epidemiological forecast of the number of mesos. As you point

1 out, the number of actual mesos may be slightly more or less,
2 but it's based on Nicholson.

3 Q I understand. Okay, thank you for that. Now focusing on
4 your testimony as it related to payment rates. I believe you
5 testified that prior to Grace's bankruptcy it paid -- it
6 resolved by payment 92.1 percent of all mesothelioma claims?

7 A Across the period 1999 through 2001 I think that's
8 approximately right, yes.

9 Q Yes. And then I mean for lung cancer, other cancer and
10 non malignant claims it resolved by payment over 95 percent of
11 each of those disease categories?

12 A I don't have the table in front of me. It's in the
13 report. But it's in that approximate number, yes.

14 Q Okay, thank you. And you have adopted or you have based
15 your liability estimate for the trust liabilities on what you
16 call your reduced payment rate scenario as opposed to your
17 lowest payment rate scenario, is that correct?

18 A Yes.

19 Q And I believe you testified that 78.3 percent of
20 mesothelioma claims would be settled by a payment?

21 A Now you're asking by the trust or in tort?

22 Q By the trust.

23 A I think for meso that's correct.

24 Q Okay. And that would mean, wouldn't it, that 78.3 percent
25 of plaintiffs who suffer from mesothelioma and sue Grace will

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1 meet the credible and meaningful evidence requirement of Grace
2 exposure that's contained within the TDP?

3 MR. GUY: Objection, Your Honor. He can't know
4 exactly what the trust will do.

5 THE COURT: Well okay, that's -- it's correct that
6 you don't know exactly what the trust will do, but I think
7 that's a fair question of this witness based on his report.
8 You may answer, Doctor.

9 A The forecast is that 78 percent of the claims you have
10 filed would be -- according to -- trust would find them to be
11 claims that should be paid, yes.

12 Q And that would necessarily mean, wouldn't it, that the
13 claimants would necessarily have to meet the criteria of the
14 trust, including the meaningful and credible evidence of
15 exposure?

16 A Yes.

17 Q Okay. You testified about the marketplace for settlements
18 that existed within the tort system?

19 A I recall that.

20 Q I want to explore that with you a little bit. You would
21 agree then that a high percentage of cases filed within the
22 tort system have multiple defendants?

23 A Yes. Yes, I do.

24 Q Okay. And is it quite often true that the multiple
25 defendants are the same targeted defendants?

1 A Are the what?

2 Q Are the same targeted group of defendants?

3 A I don't understand your question.

4 Q Well in many cases you see the same defendants in case
5 after case, is that correct?

6 A What's regarded as --

7 MR. LOCKWOOD: Objection, lack of foundation.

8 THE COURT: Well, I don't think that the witness
9 doesn't know the tort system cases based on everything he's
10 testified to. I think there's a foundation. It's just perhaps
11 that the question is a little confusing. Could you restate the
12 question.

13 Q When Grace was sued in the tort system would it often see
14 the same defendants in case after case?

15 THE COURT: As codefendants?

16 MR. CASSADA: As codefendants, that's correct. Thank
17 you, Your Honor.

18 A Other major codefendants would occur frequently --

19 Q Okay.

20 A -- as codefendants where Grace was sued, but none of them
21 would be in every case. I mean it's a moving mix.

22 Q Yeah, I understand that.

23 A Even Manville is only named in about two-thirds of the
24 cases. So the actual -- they won't be in all of them. It will
25 be a different mix from case to case, but you tend to -- you're

1 more likely to see a major defendant than a less important
2 defendant, of course, that's by definition.

3 Q I didn't ask you if they were in every case, just -- you
4 would agree they were -- you talked about the impact of the
5 bankruptcy of numerous defendants that either had or would have
6 had on Grace's settlement values, do you recall that?

7 A Yes.

8 Q And by the way, do you recall who those defendants were
9 you were referring to?

10 A Turner and Newell, Owens Corning, Fibreboard, GAF,
11 Armstrong.

12 Q Babcock & Wilcox?

13 A Babcock & Wilcox.

14 Q U.S. Gypsum?

15 A Yes. Thank you, you're very helpful.

16 Q A.P. Green?

17 A Yeah. They're not a major one, but they did go into
18 bankruptcy.

19 Q Combustion Engineering?

20 A Same as the last question. They weren't one of the eight
21 major ones I've named in the report.

22 Q They're named in the report. Now, these defendants going
23 into bankruptcy, they have the value on settlement value. I
24 assume that means that these defendants would have either did
25 before the bankruptcy and would have subsequent to the

1 bankruptcy have been in a lot of W.R. Grace cases?

2 A I would expect that most of them would have been in a
3 substantial number of W.R. Grace cases.

4 Q So that was a marketplace of settlement and it included a
5 lot of the same repeat market participants, I take it?

6 A I agree with the phenomena. I'd characterize it a bit
7 differently. But yes, there -- yes.

8 Q Did you see a lot of this -- and from jurisdiction to
9 jurisdiction did you have a lot of the same plaintiff's law
10 firms?

11 A Well the plaintiff's -- I'm sorry, plaintiff's law firms?

12 Q Yes, sir.

13 A Yes, there -- yes, there's patterns to that. Large
14 plaintiff's law firms file lots of claims.

15 Q And the plaintiff's lawyers were part of your marketplace
16 of settlement as you described?

17 A I wouldn't characterize it as part of the marketplace so I
18 don't know how to answer that.

19 Q They were participants in the marketplace?

20 A Certainly are.

21 Q Oh yes. I believe we've heard for two weeks now most
22 cases in the tort system stuff?

23 A Yes.

24 Q And in settling a case I believe you said that Grace and
25 indeed any defendant would strive to pay its several share, is

1 that correct?

2 A At most yes.

3 Q That's what the goal was was to pay a several share?

4 A Yes, they wanted to pay a fraction of the overall
5 liability.

6 Q And it's true, isn't it, that defendants are successful
7 almost all of the time in paying their several share?

8 A Yes, unless they're a sole defendant or they get a
9 judgment against them and they can't pass off some of that
10 liability.

11 Q Okay. And just to be clear about what we're talking about
12 when we're talking about a several share, I believe you said
13 it's a descriptive term and it's several as in joint and
14 several?

15 A Yes.

16 THE COURT: I'm sorry, it's several in what? I
17 couldn't hear you.

18 MR. CASSADA: As in joint and several.

19 A Yes.

20 Q And would you agree that I mean within the marketplace and
21 settlement your definition a several share is a -- it's a
22 partial share of the entire liability that once you've divided
23 that amongst the various responsible defendants would be
24 attached to the particular defendant that you're talking about?

25 A Yes, although normally it's an informal matter. It's not

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1 formally determined. But yes, I think that description is
2 accurate.

3 Q And when the parties are trying to determine a several
4 share they're looking -- they're anticipating what might happen
5 if the case were tried?

6 A In the long term, but again there's a marketplace for
7 that.

8 Q Yeah.

9 A I mean the law -- the defendants tend to know -- well,
10 they tend to know what's expected of them by plaintiff's
11 lawyers. They may not know what other defendants are paying.
12 They don't get together and talk about that. But they tend to
13 know -- they come to have a certain share and that share is a
14 partial share and has a number of ways that it gets built that
15 share.

16 Q But the parties are anticipating what several share may be
17 attached to them if the case were to go to trial?

18 A They're practices -- practices, norms, just expectations
19 that Grace has as to how much it's going to have to pay for a
20 particular kind of case to a particular lawyer in a particular
21 jurisdiction and the plaintiff's lawyers on the other hand have
22 their own expectations and usually they've done it enough they
23 know what the going rate is.

24 Q Okay. Okay. But you would agree that the parties are
25 anticipating what might happen at trial?

1 A In theory in some cases the closer you get to trial the
2 more that's true, but the process almost has a life of its own.

3 Q Now when -- in a case in the tort system when there are
4 multiple responsible defendants the more defendants you have
5 the lower a particular defendant's several share would be in a
6 particular case, is that correct?

7 A Not necessarily.

8 Q Not necessarily.

9 A It depends on who the defendants are, what the
10 jurisdiction is.

11 Q Well, as a general rule the more defendants there are --
12 the more solvent responsible defendants there are in a case the
13 lower any single defendant would expect to pay to settle the
14 case?

15 A It depends on who the co-defendants are. If it's a bunch
16 of A.P. Green's, having five A.P. Greens isn't as significant
17 as having Owens Corning as a co-defendant. So I mean there
18 isn't -- you can't make simple numerical comparisons. It
19 depends who they are. It depends on the jurisdiction. It
20 depends on the occupation. There are a lot of factors that go
21 into it.

22 Q But if it were a bunch of the big companies like the ones
23 you described that went into bankruptcy, the more of them you
24 had before 2001 the lower you would expect your several share
25 to be, correct?

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1 A In general. But remember, I'm forecasting averages. I
2 mean I'm not talking about specific cases.

3 Q Let me ask you about the importance of the extent of
4 exposure to a product to the settlement value of a case. Is --
5 would it be true that the more extensive exposure was to a
6 particular product the more valuable the claim would be against
7 the defendant responsible for that product?

8 A It isn't a straight line relationship. A claim with a lot
9 of exposure would have higher value than a claim with
10 questionable exposure. If you have a lot of exposure your
11 settlement value may not -- I mean it may or may not be
12 affected by some additional exposure to Grace, but there is
13 some relationship. It's just not a clean one.

14 Q So then so long as some minimum threshold of exposure
15 exists the extent of the exposure above that may not be
16 important?

17 A It's important, it's just it isn't as -- you know, it's
18 just -- it's a chunky kind of relationship, I'll leave it at
19 that.

20 Q You said earlier that the defendants generally knew what
21 each other were paying when they were involved in --

22 A They tend not to know that.

23 Q They tend not to know that.

24 A They have an idea, but they -- one defendant doesn't
25 generally want another defendant to know how much they're

1 paying.

2 Q But when the same -- when defendants are in a case they
3 generally know what other defendants are paying to settle a
4 case?

5 MR. FINCH: Objection, misstates the prior answer.

6 THE COURT: Yes. He just said no to that same
7 question.

8 MR. CASSADA: I asked a different question, I asked
9 generally.

10 A Again --

11 THE COURT: Generally in a non asbestos litigation
12 case does the codefendant know what the other codefendants are
13 paying to settle, is -- I just -- I'm not sure I understand the
14 question. I'm sorry.

15 MR. CASSADA: I asked him wasn't it true that
16 defendants in asbestos cases had general knowledge, not
17 specific, but knowledge generally about what the share of a
18 particular case other defendants have.

19 THE COURT: You can answer if you know, Doctor.

20 A Yes and no. They would know who the big players are, but
21 again I mean Owens Corning's share for one kind of industrial
22 exposure would be different from another. So they may know
23 that Owens Corning was a pretty big player and expect they
24 would make a significant contribution, but that will differ
25 from case to case, jurisdiction to jurisdiction, law firm to

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1 law firm. So other -- beyond that kind of very general, as you
2 say, expectation I don't think there's much precision to that
3 knowledge.

4 Q But I mean there's a meaningful amount of knowledge that
5 each defendant has about what other defendants are paying to
6 make a difference?

7 A I think I've just described that.

8 Q All right. Let me ask you this. I want to ask you then
9 about an answer you gave during a deposition on November 1,
10 2007.

11 MR. CASSADA: Your Honor, this deposition was
12 included among confidential materials and came to my possession
13 after I signed a confidentiality agreement. I don't know if
14 the material --

15 THE COURT: Could you show counsel and see.

16 MR. FINCH: Objection, Your Honor. I don't think
17 this is proper impeachment to --

18 THE COURT: I don't know what it is yet, Mr. Finch.

19 MR. FINCH: Objection, Your Honor. This is still not
20 proper impeachment. It's consistent with what he just said.

21 MR. CASSADA: I haven't gotten there yet, Your Honor.

22 THE COURT: All right, I'll wait until you get there.

23 MR. CASSADA: Okay.

24 Q All right. Dr. Peterson, you recall your deposition on
25 November 1, 2007?

1 A I recall I was deposed. I certainly don't recall
2 everything I said.

3 Q Oh I understand that. I wouldn't expect you to. But you
4 recall -- I know you recall that it was Mr. Bernick who was
5 asking questions of you.

6 A I never forget that honor, no.

7 Q And he put the following question to you and I apologize
8 it's kind of a long question.

9 A It's Mr. Bernick.

10 Q Well, in fact, I'll just focus on the last sentence of his
11 question which I think encapsulates his question.

12 "Question: It is the joint and several liability
13 enabled the individual claimant to obtain settlements that
14 reflected an individual defendant's risk of joint and several
15 liability?" You see that?

16 A I have no idea what that means.

17 Q Well, there was an objection. And then you said --

18 "Answer: Well, Grace only pays its several
19 liability. It's not going to make a payment because Owens
20 Corning is also liable or Turner & Newell is also liable. They
21 pay for a share. You referred earlier to a marketplace of
22 settlements and I agree that's what this world is, it's a
23 marketplace. The marketplace for Grace's claim is to pay for
24 it's share of liability. Theoretically it may have a joint and
25 several liability in some jurisdictions if you go all the way

1 to trial and that's a consideration that both the lawyer and
2 Grace might take with regard to the decision about whether or
3 not to settle or take a case to trial. But settlements are
4 invariably or almost invariably determined by this marketplace
5 which is based upon this several -- "

6 A I'm sorry, could you move the page up so I can see the
7 "but".

8 Q I'm sorry. Yes, I sure will. Thank you for -- "but
9 settlements" -- where did I leave off?

10 A The but.

11 THE COURT: Line 14.

12 Q Okay. Question, "But settlements are invariably or almost
13 invariably determined by this marketplace which is based upon
14 the several liability of a company, what share of the whole it
15 historically has." Question, "Well, but no company knows what
16 its several share is in the tort system, correct?" Answer,
17 "They know they're doing right." Question, "No, but they don't
18 know what other -- "

19 A Pull it up, please.

20 Q " -- no, but they don't know what other people are paying
21 so they don't know what their several -- they don't know their
22 several share, correct?" Answer, "They know what other people
23 are paying."

24 And then Mr. Bernick asks you to name a single
25 company and you said, "No company -- well a several share is

1 something that gets determined by a jury in any event at the
2 end so you have to anticipate that. But, in any one case when
3 you're settling it you may not know precisely how much is being
4 paid in that case by the defendants, but there is a knowledge
5 within the industry of the relative amounts of money that
6 people are paying." Did I read that correct?

7 A You did.

8 Q Okay.

9 MR. FINCH: Your Honor, under the rule of
10 completeness, read the next Q and A, please.

11 MR. CASSADA: Sure. Can he do that on redirect or
12 would you like me to do it?

13 THE COURT: He can do it on redirect.

14 MR. CASSADA: Okay.

15 MR. FINCH: Your Honor, it's also not inconsistent
16 with what Dr. Peterson said in response to his questions. It's
17 improper impeachment.

18 Q That is your testimony, is that statement fair and
19 accurate today? Is that testimony fair and accurate?

20 A I think the way I characterized in response to your
21 questions is probably a more appropriate description of it. I
22 wouldn't argue greater than what I said, I think I was just a
23 bit more precise in what I testified to you and I prefer that
24 explanation. But I'm not going to disavow that testimony.

25 Q You're not disavowing it and there's nothing you're

1 changing here today, I take it?

2 A I think I clarified it.

3 Q And we talked earlier about your testimony regarding the
4 bankruptcies of the big defendants that affect your analysis of
5 Grace's claim values. Generally the bankruptcies would tend to
6 push settlement values up, is that correct?

7 A Bankruptcy of Company A if it's a sufficiently significant
8 company may affect the values of Company B, yes, increasing
9 them.

10 Q Yes. And in fact, you testified that that's what happened
11 as it related to Grace in 2001 and that's what would have
12 continued to happen through the current date, correct?

13 A Well, what I testified to is the almost simultaneous
14 bankruptcies of eight other defendants drove it up. Now, if
15 Grace had just gone into bankruptcy alone would the values paid
16 by Turner & Newell have gone up. Certainly not as
17 significantly as they did when all the other companies went
18 into bankruptcy. So there may be some effect on the bankruptcy
19 created by a particular single company, but it's the joint
20 effect of all of these that was the important thing.

21 Q All right. So the more companies that file for bankruptcy
22 the more the remaining defendant's settlement values will have
23 upward pressure?

24 A Not necessarily.

25 Q Not necessarily. So the fewer bankruptcies that are filed

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1 -- the number of bankruptcies of major targeted defendants that
2 we're talking about?

3 A That's a different question.

4 Q Okay. Well, let's talk about the more of these targeted
5 defendant bankruptcies there were the higher values went up for
6 the remaining defendants?

7 A Yes, on average, but not necessarily in a particular case
8 or even for a particular other defendant. But yes, generally
9 that's the effect.

10 Q And so the idea there is that these bankruptcies affected
11 the several share as determined in the marketplace at
12 settlement?

13 A It would be reflected in the perturbations in the
14 marketplace. It would change, perhaps, again depending upon
15 who went into bankruptcy and all the kinds of factors I've been
16 answering for the last half-hour.

17 Q Okay. Is it true that many of these defendants who went
18 into bankruptcy have since emerged from bankruptcy with trusts
19 established to process and pay their claims?

20 A Yes, that's true.

21 Q And wouldn't the same principles that pushed settlement
22 values up result in at least some downward pressure on
23 settlement values where the defendant's coming -- with these
24 trusts having emerged and begun to pay claims?

25 A I don't think so for three reasons. One is that the once

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1 a share of your client's company or any company -- once it goes
2 up it's hard to pull it back down. Plaintiff's lawyers are
3 reluctant to reduce their demands. And so it's like paying for
4 gas prices. I mean they tend to move in one direction and
5 sometimes they'll go back down, but they're sticky. Secondly,
6 is that the empirical evidence is that it doesn't happen. When
7 Manville went into bankruptcy in 1982, the obligations and
8 payments by other defendants went up greatly, but when Manville
9 came out of bankruptcy in 1988, even though it was paying a
10 hundred cents on the dollar, the values didn't go up. Whatever
11 those other companies were paying, they continued to pay. And
12 so that's an example of the first point I made.

13 The third point I make is that these companies are
14 paying very modest percentages and so, if a company was paying
15 a hundred percent of its then market share when it went into
16 bankruptcy and now it's paying 20 percent, it isn't nearly
17 significant of an event.

18 Q Let's look at the case of Grace just for a moment. The
19 scheduled value for a mesothelioma claim for Grace under the
20 Trust distribution procedures is \$180,000?

21 A I think that's right. Yes.

22 Q And the average value is \$250,000?

23 A Two hundred and twenty-five, I believe.

24 Q Two hundred and twenty-five. Okay. And the projection, I
25 believe, is that the Trust is going to pay 25 to 35 percent of

1 that figure?

2 A I believe so.

3 Q Okay. And when Grace went into bankruptcy, it was paying
4 about \$90,000 per claim?

5 A In 1990 -- in 2001, it was paying between 90 and 97,000
6 yes.

7 Q Okay. And so, but then it was after that, its liabilities
8 would have increased because it was going to take on all these
9 other shares but, if you compare the -- assume 35 percent of
10 \$225,000, I mean, you're talking not a huge drop from the
11 90,000 Grace was paying when it went into bankruptcy, correct?

12 A It wasn't paying a huge share when it went into bankruptcy
13 by itself. Today, if it were -- it still wouldn't be paying a
14 huge share and, on the total value, the joint and several
15 value, of mesothelioma claims are considered -- is considerably
16 higher than what it was in 2001. So, if it's a 30 percent of a
17 \$200,000 payment here, that's a \$60,000 payment on a claim
18 that's now more valuable in general than a \$90,000 payment on a
19 claim at less value. So, there is a payment but it's certainly
20 a reduced contribution to the overall liability.

21 Q And within the marketplace of settlements -- that is,
22 within the tort system -- are the Trust claimants, to your
23 knowledge, are they being processed into that marketplace?

24 A You mean -- I don't understand your question.

25 Q Well, these trusts are out and they're paying money to

1 claimants.

2 A Some are.

3 Q Is that money being processed into the settlement values
4 determined by the tort system which you've described as the
5 marketplace of settlements.

6 THE COURT: I'm sorry. Are you asking whether,
7 rather than the TDP values in the Trust setting the values of
8 the claims and the distribution percentage, something is
9 happening in the tort system to drive that?

10 MR. CASSADA: I'm asking him -- that's what I'm
11 asking him, Your Honor, and when you paraphrase it to me, I can
12 see that it's not a very helpful question so I'll rephrase it.

13 Q Are the payments that plaintiffs are receiving in trust,
14 do you know whether they're being processed in the settlement
15 values of the non-bankrupt defendants who are resolving claims
16 within the tort system?

17 A You're term processed isn't very helpful but I don't think
18 that any defendant really is. The amount they're paying to a
19 claim is going to be much affected by the trust payments by
20 other trusts that are coming on line now. I don't think so for
21 reasons I've described earlier.

22 Q So the effect of the bankruptcies on settlement values, it
23 only works one way?

24 A It --

25 Q When they go out, settlement values go up, when they come

1 back out of bankruptcy, and they start -- the Trusts start
2 paying claims, the settlement amounts are unchanged? Is that
3 your testimony?

4 A That's the historic experience. Now, whether there's some
5 -- I'm sure in some cases there's some adjustment. A defendant
6 will argue that, I don't need to pay you as much money now
7 because you're getting paid by the Owens Corning Trust. And
8 how much bite that will have depends upon the negotiating
9 tactics and the strengths of the plaintiffs and defendants in a
10 particular case. It's an argument and it may have some bite.

11 Q Okay. Do you know whether plaintiffs who received
12 payments for trusts have an incentive to keep those payments
13 confidential from defendants they're suing in the tort system?

14 A I haven't thought about that.

15 Q There are confidentiality provisions in trusts, you're
16 aware of that?

17 A There are confidentiality provisions for most defendants
18 and for trusts, there's concern because the information being
19 submitted is about sensitive personal material, including
20 medical information. In general, the information of trusts is
21 confidential as it is for any defendant.

22 Q But in a -- yeah. In the tort system, all the defendants
23 know who -- what other defendants were sued, right?

24 A I'm sorry. Would you ask that question?

25 Q In the tort system, all defendants, they know who else is

1 in the case, correct?

2 A Not necessarily. Sometimes claims are made without being
3 filed in a lawsuit.

4 Q Well, if a defendant is sued in the tort system, all the
5 other defendants in the suit are aware of that?

6 A Sometimes claims are made without being a named defendant
7 in a lawsuit. There are defendants who pay claims without --

8 Q I asked a different question.

9 A -- in fact, specifically wanting to avoid being named and
10 those are not known.

11 Q I ask a different question now and that is that, when a
12 defendant is sued in the tort system, all other defendants know
13 that that defendant has been sued?

14 A That's -- yes, I would expect so.

15 Q When a plaintiff files a claim against the Trust, is that
16 knowledge public information?

17 A I don't believe so.

18 Q When a plaintiff provides evidence of Grace exposure to
19 the Trust, is that considered sensitive information?

20 MR. BERNICK: Your Honor, we've been going on for a
21 while and I'm also concerned about Dr. Peterson being able to
22 get out of here. I object to relevance. I don't understand
23 the relevance of this whole line of questioning, what's
24 happening in tort system values and all the like. I don't
25 think it's relevant to any issue in the case.

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1 THE COURT: What's the relevance?

2 MR. CASSADA: I'm exploring the marketplace of ideas
3 that Dr. Peterson --

4 MR. BERNICK: That's marketplace claim values.

5 MR. CASSADA: Marketplace claim values.

6 MR. BERNICK: This case used to turn on that kind of
7 thing when it was an estimation case. It doesn't now. I don't
8 know what confirmation issues that bears upon.

9 THE COURT: I don't understand what the relevance is
10 at this point either. I'll give you some leeway. This is
11 cross examination, but I'm not certain I understand the
12 relevance either.

13 MR. CASSADA: Okay.

14 Q Dr. Peterson, we talked earlier about the projected
15 payment by the Trust under the TDP of 25 percent to 35 percent?

16 A Yes.

17 Q Did you have a role in determining that range of payments?

18 MR. FINCH: Object to form. The plan in TDP says
19 that the payment percentage will be set by the trustees after
20 the Trust is up and running so it hasn't been set one way or
21 the other yet.

22 THE COURT: All right. Do you want to rephrase your
23 question?

24 MR. CASSADA: But the projected -- yeah.

25 Q The projected payment, right, is 25 to 35 percent, is it

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1 not?

2 A I've heard that number. I don't know where it appears and
3 it may be just informal discussion and I'm not sure that that
4 captures the range.

5 Q Did you have any involvement in the calculation of that
6 number?

7 A I don't believe I had any involvement in calculating that
8 number. I have provided liability forecasts that are an
9 element of that calculation but I don't think we've done it.

10 Q Do you have knowledge with respect to whether there's a
11 preferred or most likely point within that range of 25 percent
12 to 35 percent?

13 A No.

14 MR. CASSADA: Thank you, Your Honor.

15 THE COURT: All right.

16 MR. CASSADA: Thank you, Dr. Peterson.

17 THE WITNESS: Thank you.

18 THE COURT: Mr. Pasquale?

19 MR. PASQUALE: Ken Pasquale for the Unsecured
20 Creditors Committee.

21 CROSS EXAMINATION

22 BY MR. PASQUALE:

23 Q Good afternoon, Dr. Peterson.

24 A Good afternoon, Mr. Pasquale.

25 Q I know you have a plane to catch. I'm going to be as

1 quick as I can.

2 A I appreciate your consideration.

3 Q I want to focus on your original estimation report. I
4 understand you were advised of the certain typographical errors
5 but that's what I want to talk about for a few minutes. Your
6 opinion with respect to Grace's liabilities for the estimation
7 proceeding, that was not the only opinion that was submitted by
8 the parties, was it?

9 A There were other experts' generated reports and what was
10 done with them formally in the case, I can't tell you.

11 Q I'm sorry, sir. I didn't hear.

12 A Other reports -- I've seen other reports by other experts.
13 Whether they were submitted in any formal sense, I have no
14 idea.

15 Q Well, you know that Jennifer Biggs submitted a report for
16 the future claims representative, right?

17 A I know she wrote a report. I don't know what was done
18 with it.

19 Q Do you know what her estimate was as you sit here today?

20 A I don't recall.

21 Q Well, how about Dr. Florence for Grace? You know that he
22 submitted an opinion with respect to the estimation, right?

23 A I do recall that. Yes.

24 Q Okay. And his -- do you recall that his median estimate
25 of Grace's liabilities was \$468 million?

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1 A It was something like that, yes.

2 Q Something in that range? That's what you recall?

3 A It was an implausibly low number. Yes.

4 Q Implausibly --

5 (Laughter)

6 A Yes.

7 Q Right. Because your estimate, your most likely estimate,
8 was over \$5 billion, right?

9 A Well, that wasn't why it was implausible, but my estimate
10 was that, yes.

11 Q Okay. Now, you recall that, during this bankruptcy case,
12 there was a personal injury questionnaire process, right?

13 A There was for some claimants, yes.

14 Q For many claimants, right?

15 A For some claimants, yes.

16 Q And you did not quantitatively use any of the information
17 in any of those questionnaires in any way in rendering your
18 opinion with respect to Grace's liabilities, personal injury
19 asbestos liabilities, right?

20 A I don't think that's correct.

21 Q Well, we heard your direct testimony today, sir, and
22 personal injury questionnaires never came up in all of your
23 slides and all of your discussion, isn't that right?

24 A It didn't enter into the calculations about which I've
25 testified but I generated the rebuttal --

1 Q But my question, sir -- I'm sorry.

2 A Would you let me answer?

3 Q Yes.

4 A I generated a rebuttal report addressing these issues
5 based in part upon that data.

6 Q My question was, in rendering your opinion, did you use any
7 of the information in the questionnaire quantitatively to reach
8 your conclusion?

9 A The same answer. Yes with regard to the rebuttal issues;
10 no with regard to my estimation report.

11 Q Thank you. And the same question with respect to the
12 proofs of claim. You're aware that there was a proof of claim
13 process in this case, right?

14 A Yes, and I discussed that in my report.

15 Q Discussed it but did you quantitatively use any of the
16 information in the proofs of claim in rendering your opinion?

17 A I did some, yes.

18 Q Quantitatively?

19 A Yes.

20 Q It had an impact on your conclusion of in excess of \$5
21 billion?

22 A I had quantitative -- yes. There are payments -- it's not
23 my final opinion. I didn't use it for calculating the
24 liability for the reasons that I discussed in part because of
25 the quantitative analyses that are in my report.

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1 Q Okay. Thank you, sir. You've answered my question. Now,
2 it's true, sir, isn't it, that you don't quantify in any of
3 your estimation work in this case how much disease was caused
4 or contributed to by Grace, isn't that right?

5 A That's an impossible task and I haven't sought to do it.

6 Q Well, my question is you didn't do it, right?

7 A I didn't do it because it was an impossible task.

8 Q Okay. Now, you talked earlier about propensity to sue but
9 went through that pretty quickly and maybe I missed it, but I
10 didn't hear you mention what period you actually applied to the
11 propensity. What period did you use?

12 A 1999 to 2001 and I actually did testify to that effect.

13 Q Okay. I didn't catch the dates. Thank you. And I
14 believe you said, in response to a question from counsel on
15 cross examination that, at least with respect to the cancer
16 claims, you kept that propensity constant from 2006 forward,
17 right?

18 A At the rate it was in 2006, yes.

19 Q Does the same apply to non-malignant claims?

20 A No. Well, the non-malignant forecast was treated
21 differently in the tort report and the Trust report.

22 Q Okay. I'm only focused on the tort report. I'm not
23 interested in the Trust report.

24 A In the trust, well, we didn't calculate propensity of suit
25 for non-malignant claims.

1 Q Okay. Now, with respect to the cancer claims, and
2 mesothelioma in particular, the period you chose for the
3 propensity to sue represents the highest filing period of
4 claims against Grace in its history prior to the bankruptcy
5 case, isn't that right?

6 A I don't think that every year in that period were the
7 three highest.

8 Q That's not what I said. During that -- that represents --
9 let me repeat it -- represents the highest filing period of
10 claims, in 1999 to April 2001, in Grace's pre-petition history,
11 right?

12 A Yes, they were because they were the most recent years
13 which are the most relevant for forecasting future liabilities
14 and because the trends, the actual trends, were up. So, it had
15 to be the highest numbers if it was going to be the most
16 relevant data.

17 Q Well, those are the years you chose and they happen to be
18 the highest numbers, correct?

19 A For the reasons that I said, yes.

20 Q Okay. Understood. Now, you would agree with me, Dr.
21 Peterson, that your estimation model attempts to predict
22 behaviors relating to the filing and settlement of claims,
23 right?

24 A I'm sorry. Could you repeat that question?

25 Q Sure. Does your estimation model attempt to predict

1 behaviors relating to the filing and settlement of claims?

2 A It attempts to predict the results of the behaviors, not
3 necessarily the behaviors directly. It predicts numbers of
4 claims which are partly a function of the behavior of lawyers
5 and the law firms and the claimants, victims.

6 Q And, certainly, your methodology has some limitations,
7 including that you can't speculate about certain future events,
8 right?

9 A Presumably any expert report can't speculate and so, no, I
10 don't do that.

11 Q Okay. And some of the future events that you cannot
12 predict in the future includes legislative changes, right?

13 A Oh, God, no. I can't --

14 Q No, you can't predict?

15 A I can't predict future legislative changes. I don't know
16 who can.

17 Q Right.

18 A I know who tries but I don't know that anyone can.

19 Q Now, sir, would you agree with me that the maximum period
20 of time that any -- I believe you called it the standard
21 estimation model earlier in your testimony, right? Is that --
22 let me withdraw that question.

23 A That's a term I've used. Yes.

24 Q And that term applies to the methodology that you
25 described to us today, right?

1 A That I and many people use. Yes.

2 Q Okay. Would you agree with me that the maximum period of
3 time that your standard estimation model can reliably predict
4 changes in claiming and claim resolutions is six or seven
5 years?

6 A I don't have that opinion.

7 Q You don't have that opinion?

8 A No.

9 Q I show you -- the ELMO please -- the bottom of the page.
10 This is from your deposition on November 1st, 2007 and, you
11 know what, I'm going to do this differently.

12 MR. PASQUALE: If I may, Your Honor.

13 (Pause)

14 MR. PASQUALE: Do you mind if I --

15 THE COURT: Yes.

16 MR FINCH: Object to form, Your Honor. It's a
17 different question in the deposition than what he just asked.

18 THE COURT: Thank you. He just retracted the
19 question and said he's going to do it differently.

20 (Pause)

21 Q Dr. Peterson, would you turn to Page 46, please?

22 A Yes, I have that.

23 Q Okay. You were asked the following question by Mr.
24 Bernick at your deposition, the following questions, and you
25 gave these answers. Question: Can you --

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1 A Could you tell me the line you're starting at?

2 Q Yes. I'm sorry. Of course. It's Line 11 on Page 46.

3 A Thank you.

4 Q "Can you identify any scientific model, Dr. Peterson, that
5 has been shown reliably to predict changes in the legal
6 environment? Answer: What do you mean by the legal
7 environment?"

8 Q Question: "Law suits being filed and litigated, claims
9 being filed and litigated, claims being presented settled. Do
10 you know of any scientific model that has been demonstrated to
11 reliably predict changes in the legal environment?" There's an
12 objection.

13 MR. FINCH: Object to form. Compound.

14 Q "Over modest periods of time, there have been models of
15 claiming and claim resolutions that have reliably predicted
16 subsequent changes. Yes."

17 "Okay. What's the maximum period of time? Six years,
18 seven years."

19 Q Were you asked those questions and did you give those
20 answers under oath, sir?

21 MR. FINCH: Objection, Your Honor. It's a different
22 question than what he asked him.

23 THE COURT: It is. That's sustained.

24 MR. FINCH: It's a completely different question.

25 THE COURT: It is a different question. You asked

1 him initially about whether the model could reliably predict
2 changes in claims and claims resolutions over six or seven
3 years, not changes in the legal environment. It is a different
4 question.

5 MR. PASQUALE: Well, Your Honor, his testimony here
6 under oath was over modest periods of times, there have been
7 models of claiming and claim resolutions. This is starting on
8 Line 21, Page 46 --

9 MR. FINCH: Your Honor, the --

10 MR. PASQUALE: -- that have reliably predicted
11 subsequent changes.

12 MR. FINCH: Your Honor, the question was changes in
13 the legal environment.

14 THE COURT: Legal environment. It's a different
15 question. The objection is sustained.

16 MR. PASQUALE: All right. I'll move on.

17 Q Dr. Peterson, in your estimation work here with respect to
18 Grace, you predicted increases -- well, strike that. In the
19 estimation work you originally did with respect to the
20 estimation proceeding, with respect to your prediction of
21 non-malignant claim filings in the future -- sorry.

22 A I'm sorry. I don't know --

23 Q I'll try that one more time.

24 A I don't understand the reference to --

25 Q Bad question. I'm going to try one more time. You

1 predicted at the time of your estimation report that
2 non-malignant claim filings would be at a particular level,
3 right?

4 A The 2007 report?

5 Q Yeah. Um-huh.

6 A We based our -- we had a particular forecast for
7 non-malignant claims at that time based upon the information we
8 had at that time.

9 Q And you predicted, did you not, that non-malignant claims
10 would increase in the future from that point in time, didn't
11 you?

12 A 2007? I don't believe so.

13 Q Do you recall -- I think we're going to do it again.
14 Let's look at your deposition, Dr. Peterson. Let's look at --
15 let's start on Page 70, please, Line 12. Just to save time,
16 there was a very long question from Mr. Bernick before that but
17 it's really your answer I want you to focus on. The question
18 in Line 12, starting on Line 12, "What is that scientific
19 methodology?" and that refers to Mr. Bernick's prior question
20 that begins on the bottom of Page 69. And you give a rather
21 long answer, Dr. Peterson, but I'll read it.

22 A "Well, the methods that I used, if you have reason,
23 non-speculative reason to anticipate that event is going to
24 occur, and you understand what the effect of that event is, you
25 can predict it. I'll give you an example. We know that the

1 asbestos Trust, a lot of asbestos bankruptcy plans, are going
2 to be confirmed and, when they get confirmed, they're going to
3 provide a lot of money for compensation of asbestos victims. A
4 substantial amount of that money will go to non-malignant
5 claimants. As a result of that, there will be an increase in
6 the level of non-malignant claim filings in future years from
7 what we see now. Of course, there's going to be money to
8 compensate victims. Victims and plaintiffs' lawyers will file
9 claims. They'll engage in the expense necessary to develop the
10 claims to meet those claims and they'll file. We can
11 anticipate that. That's a prediction. You can come back and
12 ask me that in six years. I can anticipate that."

13 Q Were you asked that question and did you give that answer?

14 A Well, I gave that answer but, again, it isn't what you
15 asked me about before. This is a hypothetical discussion. We
16 don't know if that's true yet. Is that --

17 Q You made a prediction, didn't you, Dr. Peterson?

18 A Excuse me. Would you let me finish my answer?

19 MR. FINCH: Objection, Your Honor. Let the witness
20 finish, please.

21 THE COURT: He's going to finish. Go ahead, Dr.
22 Peterson.

23 A This is a -- it's a prediction. There's still reason to
24 think that may be true. In fact, I've just gotten e-mails that
25 in the State of Texas, they're now resuming screening so that

1 is a -- there are a couple of rules I have about asbestos
2 litigation. One of them is that claims follow money. If
3 there's money there, people will want to make claims. And
4 here's an instance where there's money being set aside and
5 there's every reason to believe that, at some point in time,
6 plaintiffs' lawyers are going to go after that money. Now,
7 whether or not that's going to occur, we haven't seen yet but
8 that's -- it was never represented in any forecast that I gave
9 for W.R. Grace. It was a discussion on -- this is a general
10 scientific discussion. It's not a particular to W.R. Grace.
11 So in answer to your earlier question --

12 Q Are you finished with your answer?

13 A -- did I do a forecast of increasing --

14 Q That wasn't my question.

15 A -- of increasing non-malignant claims for Grace, no, I
16 didn't.

17 Q That wasn't my question, sir, but the record will reflect
18 that. Isn't it true, sir, that in your most recent report
19 concerning the Trust, you reduced by half the number of
20 malignant claims that you forecast for the future?

21 MR. FINCH: Object to form. Non-malignant claims or
22 malignant claims?

23 MR. PASQUALE: Non-malignant claims.

24 A Yes, for the reasons we have different -- I engage in
25 empirical research. If the facts change, the forecasts need to

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1 change. We have different facts available to us now, different
2 information about the world than I had in 2007. It would be
3 unreasonable not to respond to them so we change the forecasts.
4 I have concerns that the claims, the non-malignant claims, may
5 go back up for the reasons I just described about the screening
6 process plus some of the claims filings I'm seeing with trusts.

7 MR. PASQUALE: Move to strike everything after yes as
8 non-responsive, Your Honor. That's all I have.

9 MR. FINCH: Is there anyone else?

10 MR. KOVACICH: Can I have just a moment to confer
11 with counsel, Your Honor?

12 (Pause)

13 THE COURT: Do you folks need a recess?

14 MR. KOVACICH: I don't have any questions for this
15 witness, Your Honor.

16 THE COURT: Anyone?

17 (Pause)

18 THE COURT: Mr. Phillips?

19 MR. PHILLIPS: Thank you, Your Honor.

20 CROSS EXAMINATION

21 BY MR. PHILLIPS:

22 Q Dr. Peterson, good afternoon. My name is Bob Phillips.
23 It's a pleasure to meet you, sir. Just a couple of quick
24 questions. Dr. Peterson, in your analysis of the pre-petition
25 claim costs, I'll call it, did you try to identify any claims

Peterson - Cross/Phillips

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1 costs that we'd call indirect costs? In other words, payments
2 that the debtor or the asbestos industry would have had to pay
3 for other than direct payments to injured people?

4 A Are you talking about contribution claims?

5 Q Or indemnity. Either one.

6 A I don't think we made an independent examination of that.

7 No.

8 Q And that would mean that you didn't do any estimate of
9 what that indirect -- what I'll call an indirect cost might
10 have been pre-petition?

11 A The only way it might have been -- it was not made as a
12 separate calculation, certainly not. It may have been
13 incorporated, depending upon how the database treats an
14 indirect claim. If it comes in under the name of particular
15 defendant, it may be -- excuse me -- particular plaintiff whose
16 costs are being reimbursed, requested, then it would have been
17 included but not separated.

18 Q And so, then, may we assume, Doctor, that the numbers, the
19 dollar amount of the claims that will be presented to the Trust
20 according to your estimation doesn't include what we would call
21 indirect asbestos personal injury claims?

22 A Well, the Trust distribution procedures has specific
23 provisions for dealing in indirect claims within the TDP and
24 essentially what it does is it puts the indirect claimant in
25 the footing of the claimant. If the indemnification or

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1 contribution claimant has paid for and gotten a release for the
2 liability of Grace for a particular claimant, then, in effect,
3 that person requesting indemnification contributions has made
4 the claim and that becomes the claimant. So, it's included in
5 the calculation under the TDP.

6 Q And if the -- if there is an effect that would allow an
7 indirect personal injury or asbestos personal injury trust
8 claimant to recover more than a direct one, then that wouldn't
9 be included in your estimate, true?

10 A Well, in principle, they can't recover more because
11 they're standing in the shoes of the plaintiff.

12 Q Right. My hypothetical was, if they could recover more
13 than the direct claimant, then your projections don't include
14 those sums, true?

15 A But you're talking about a different TDP and we didn't
16 make forecasts for a TDP other than the one that's in this
17 plan.

18 Q I'll just try it once more. Can you assume for a moment
19 that an indirect asbestos personal injury trust claimant could
20 recover more than a direct one? Can you assume that fact for
21 just a second?

22 A I can't and do a forecast involving this TDP. It's
23 logically impossible to do. It doesn't happen.

24 Q And you didn't do that here?

25 A I didn't do that.

Peterson - Redirect/Finch

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1 Q Thank you.

2 MR. PHILLIPS: No further questions.

3 THE COURT: Anyone else? Mr. Finch?

4 REDIRECT EXAMINATION

5 BY MR. FINCH:

6 Q Dr. Peterson, do you have -- you were asked some questions
7 about Mr. -- by Mr. Pasquale about your projection of future
8 non-malignant claims that Grace would face if it hadn't gone
9 into bankruptcy. Do you recall those questions?

10 A I recall those questions.

11 Q Do you have your estimation report in front of you? It's
12 Plan Proponent's Exhibit 199.

13 A I do.

14 Q Could you turn in that report --

15 MR. FINCH: Can I have it on the screen, please?

16 Q Turn to Page 67.

17 A I have that.

18 Q It's the wrong page. That page right there. How many
19 claims, non-malignant claims, did Grace receive in the year
20 2000?

21 A 40,079.

22 Q How many non-malignant claims did Grace receive in the
23 first quarter of 2001?

24 A 30,292.

25 Q Could you turn to the very last page of that same exhibit,

1 Table C-3?

2 A Yes, I have that.

3 Q How many non-malignant claims did your estimate forecast
4 that Grace would -- would be filed against Grace beginning in
5 2002?

6 A 29,419.

7 Q And of that number, how -- approximately how many did you
8 project would be paid?

9 A Approximately less than 40 percent.

10 Q And so is it true that you projected a declining number of
11 non-malignant claims compared to what Grace's actual historical
12 experience had been?

13 A Yes. It was a decline.

14 MR. FINCH: Could I have the ELMO?

15 Q Does this chart show the relationship between Grace's past
16 non-malignant claims and its future non-malignant claims?

17 A Yes.

18 THE COURT: Can you -- what was the exhibit number,
19 please?

20 MR. FINCH: It's Plan Proponent's Exhibit 178B, Slide
21 51.

22 A Yes, it shows that. It shows also the number of
23 compensable claims forecast as compared to the historic
24 compensable claims which is lower in all years since about
25 1994.

Peterson - Redirect/Finch

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1 Q Do you recall that Mr. Pasquale also asked you a question
2 about -- some questions about Dr. Florence's estimate done for
3 Grace in the estimation case?

4 A I do.

5 Q You said that you found that estimate implausible.

6 A I did.

7 Q Can you explain why?

8 A Well, it used a method that was unique to that one work.

9 It was based upon -- the whole estimate liability was based on
10 the values of five mesothelioma claims. That was the basis for
11 valuing all of the hundreds of thousands of claims that might
12 be filed and it was based on data from the proofs of claim that
13 were recorded by contractors for the debtor which we found to
14 be quite incomplete and inaccurate. And if you use accurate
15 data, the liability forecast, by including people that should
16 have been counted in this forecast, in calculating value, the
17 liability would have been far higher. There are lots of
18 reasons. It's basically unreliable.

19 Q And did you express those opinions in a rebuttal report at
20 the time?

21 A I did.

22 Q Finally, Dr. Peterson, lawyer for Garlock -- and I
23 apologize --

24 A Mr. Cassada.

25 Q Excuse me?

1 THE COURT: Mr. Cassada.

2 Q Mr. Cassada asked you some questions about co-defendant
3 settlements. Do you recall those questions?

4 A Yes.

5 Q In your direct examination, you testified that you -- for
6 purposes of your work, you couldn't get access to data from
7 defendants that are still in the tort system. Do you recall
8 that testimony?

9 A Yes.

10 Q Do you have an understanding whether or not defendants
11 that are still in active tort litigation, asbestos defendants,
12 keep their settlement data confidential?

13 A Yes, I have an opinion.

14 Q Not an opinion. Do you know one way or another?

15 MR. CASSADA: I object.

16 THE COURT: You need to use a microphone. The
17 question is, does he know whether they keep their settlement
18 data confidential; that is, the co-defendants in the tort
19 system. It's a do you know. The objection is overruled.

20 A Yes.

21 MR. CASSADA: Well, the objection was on the basis of
22 the scope of the cross. It's outside the cross.

23 THE COURT: No. I think this is in the scope.
24 Overruled.

25 Q Do you know?

Peterson - Recross/Bernick

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1 A I know and they don't want anyone else to see it. They
2 protect that very vigorously and aggressively.

3 Q And --

4 MR. FINCH: Nothing further, Your Honor.

5 MR. PASQUALE: No recross, Your Honor.

6 MR. KOVACICH: That's all I have.

7 THE COURT: Mr. Bernick?

8 RECROSS EXAMINATION

9 BY MR. BERNICK:

10 Q Mr. Pasquale is here. He asked you some questions on
11 behalf of the Unsecured Creditors. And so do you remember that
12 he asked you questions about your methodology?

13 A I do recall that.

14 Q Okay. And, in particular, he confronted you with
15 questions that you had been asked in connection with the
16 deposition about the how far out the methodology had been
17 proven, do you remember that?

18 A I just don't think that was his question.

19 Q Well, something like that, but it can only -- you've only
20 been able to ascertain the reliability of the methodology by
21 verifying it against empirical facts, at least as concern
22 changes in the legal system, for about seven years?

23 A I don't even think that was accurate.

24 Q Okay. Well, I --

25 A It asks -- I said that you could only go out for a modest

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1 period of time and he asked me to quantify modest but I wasn't
2 stating you could only forecast some things for six or seven
3 years. It's too specific and actually mis-describes my
4 testimony.

5 Q Okay. And I certainly didn't intend to do that. Do you
6 also recall that he asked you some question regarding basically
7 words to the effect that your methodology doesn't use the --
8 didn't use the PIQ questionnaire data. Do you remember that?

9 A Yes.

10 Q Now, your methodology -- he then asked you about some
11 other people that had submitted expert or estimates, expert
12 estimates, in connection with the estimation process. Do you
13 remember that?

14 A Yes.

15 Q And he asked you in particular about Mr. Florence, right?

16 A Yes.

17 Q And Mr. Florence had a different method? Fair?

18 A Yes, he certainly did.

19 (Laughter)

20 Q Well, I think you're going to want to get me to wind the
21 clock back here, Dr. Peterson. This afternoon will last a lot
22 longer.

23 A Whatever you want, counsel.

24 Q Okay. So, we had your methodology that you used and then
25 he asked you -- Mr. Pasquale asked you about Ms. Biggs. Do you

1 remember that?

2 A I do.

3 Q And, so, we have Peterson, Biggs. We have Florence who
4 uses the different method. But then we have a Chamber in here
5 for the second slot that's not filled. That Chamber is who?

6 A Who were experts that didn't submit reports?

7 Q Oh, no. It hasn't been mentioned here but has the name
8 Chambers.

9 A Well, Dr. Chambers.

10 Q Okay.

11 MR. PASQUALE: Objection, Your Honor. Lacks
12 foundation. Misstates the record.

13 Q Did Dr. Chambers --

14 THE COURT: Wait. I'm sorry.

15 MR. BERNICK: Strike that.

16 THE COURT: I think he's being asked whether there
17 was yet another expert.

18 MR. PASQUALE: And another expert report.

19 THE COURT: Yes.

20 MR. PASQUALE: And it lacks foundation. Mr. Bernick
21 is heading down a path where he's incorrect.

22 THE COURT: Okay. There is no other expert report?

23 MR. PASQUALE: Your Honor, I don't want to testify as
24 others have done in this courtroom but Ms. Chambers submitted a
25 rebuttal report, did not give her own opinion. She simply

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1 responded to others.

2 THE COURT: Okay.

3 MR. BERNICK: Okay. Well, I'll accommodate that
4 concern. I think Mr. Pasquale is perhaps technically accurate.

5 (Laughter)

6 MR. BERNICK: I didn't mean that with disrespect. I
7 think he's being right.

8 Q So, but Mr. Pasquale representing the unsecured creditors
9 didn't mention the Chambers report?

10 MR. BERNICK: Is that okay?

11 Q He didn't mention the Chambers report, right?

12 A I only recall a Chambers rebuttal report.

13 Q Right. But he didn't ask you about the Chambers report
14 just now on cross?

15 A I don't believe -- I never saw one.

16 Q Okay. Did you review any work by Dr. Chambers in this
17 case?

18 A I reviewed her rebuttal report. I reviewed her
19 deposition. I don't recall if I reviewed anything else.

20 Q Okay. So, you reviewed Ms. Biggs's work? You reviewed
21 Dr. Chambers's work and you reviewed Dr. Florence's work,
22 right?

23 A Yes, some of it. Yes.

24 Q Okay. Now, your own analysis uses a -- adopts an approach
25 which uses historical settlement values and makes projections

1 based upon propensity to sue and historical settlement values?

2 Is that roughly fair?

3 A Yes.

4 Q Is there a short way of referring to that methodology?

5 A It's not really quite past his prologue but it's past and
6 current his prologue.

7 Q Settlement, past settlement, and propensity, and then you
8 project the future based upon the past and part of the backbone
9 for the future is the epidemiological curves, correct?

10 A Yes, plus looking at a period of time that's the future
11 for purposes of the forecast but we already know what happened.
12 We have perfect vision on that.

13 Q Now, Ms. Biggs, how did her methodology compare to yours?
14 Was it the same or different?

15 A She used generally the same method but there are
16 substantial differences and I don't -- I haven't reviewed it
17 recently and don't feel I can testify about it.

18 Q Okay. But does she also use past settlement and
19 propensity?

20 A She does.

21 Q And does she also use epidemiology to provide the
22 backbone?

23 A Yes, she does. They have their own epidemiological
24 forecast that --

25 Q So, we've now got two folks who basically take the same

1 kind of approach? Fair?

2 A Yes.

3 Q What about Ms. -- Dr. Chambers? I know that Mr. Pasquale
4 points out correctly that there was no independent estimate
5 that Dr. Chambers did. But the question to you is, does she
6 take the same or different approach in that she too uses
7 epidemiology?

8 A Well, she says in her rebuttal report that she agrees with
9 regard to the basic methods that I use.

10 Q Okay. Does she also look to past settlement and past
11 propensity?

12 A Yes.

13 Q Would it be fair to say that if we want to look at the
14 estimation, three out of the four experts who did work on
15 estimation, including the expert retained by the unsecured
16 creditors themselves, all followed the same basic methodology?

17 A As I would recall, I would say that all of us used a
18 version of the standard approach.

19 Q So, to the extent that Mr. Pasquale is suggesting that
20 your methodology is different and subject to question, because
21 the PIQ data wasn't used, could that criticism also be lodged
22 against Ms. Biggs and Dr. Chambers?

23 MR. FINCH: Objection to form. Lacks foundation,
24 Your Honor.

25 DEPUTY CLERK: Use the microphone.

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1 MR. FINCH: I thought I was.

2 THE COURT: There was an objection to the form and
3 lacks foundation.

4 MR. BERNICK: Well, okay.

5 Q The question that was raised or the observation that was
6 made -- let's just make it that way. The observation that was
7 made that you didn't rely upon the PIQ data, could that same
8 observation be made by two other experts in the case, including
9 the expert retained by the unsecured creditors?

10 MR. FINCH: Same objection, Your Honor.

11 THE COURT: I don't know if he knows.

12 MR. BERNICK: I would ask if he knows.

13 A I don't think I know about what Dr. Chambers would have
14 done with that because she could have used that somehow in the
15 standard method and I don't recall what Dr. Biggs said.

16 Q Okay. Fair enough. The idea of using -- Mr. Pasquale
17 also asked you about which years you use for your calibration
18 period; that is, 1999 through, I think it was, '01.

19 A Yes.

20 Q Okay. Ms. Biggs, did she have a calibration period?

21 A Yes, but I don't recall. Oh, yes. I think it was the
22 same period.

23 Q What about Dr. Chambers? Do you remember if she had a
24 calibration period?

25 A She, for some purposes, she went back to 1994. I think

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1 that might have been for values but not propensity to sue. I
2 don't recall the propensity to sue.

3 Q Does the calibration period, if she went back to '94,
4 given the curves that you showed that went up precipitously in
5 the '98 to '01 period of time, if she went back all the way to
6 1994, what effect would that have on the calculation in the
7 case of Grace?

8 MR. PASQUALE: Objection, Your Honor. The witness
9 said he didn't recall what Dr. Chambers did.

10 MR. BERNICK: I just said if she did.

11 THE COURT: He said that he believes she went back to
12 1994 but with respect to values, not propensity to sue.

13 MR. BERNICK: Same thing.

14 Q Would that have an impact on the calculation?

15 A Well, yes. It would be -- it's an out-of-date era.
16 Asbestos litigation has changed in many ways and repeatedly.
17 It would be like trying to estimate the amount of teenagers
18 using telephones by looking to an era before there were
19 iPhones and such devices. It just isn't pertinent. It's not
20 relevant to the task here which is to forecast the future.

21 Q Okay. So, let's in fairness say, okay, let's focus on Dr.
22 Florence. The real novelty in the estimation trial, was it or
23 was it not the approach that Dr. Florence took?

24 A It certainly was novel. I would say it's the real
25 novelty. It was the outlier. It was the --

1 Q It was the outlier.

2 A It was the unusual.

3 Q And it was our position, we felt, totally grounded in the
4 law, science in fact, and we said those things and meant those
5 things. But in the history of estimation --

6 A Really?

7 Q Absolutely. In the history of estimation, has there ever
8 been an asbestos case that adopted the approach that Dr.
9 Florence adopted in connection with his work on the estimation?

10 MR. PASQUALE: Objection, Your Honor. Lacks
11 foundation.

12 THE COURT: Well, if he knows.

13 Q If you know?

14 A I know of none. I know of most estimations, perhaps not
15 every one. None that I know of have used that method.

16 MR. BERNICK: Nothing further, Your Honor.

17 THE COURT: Anyone else?

18 MR. PASQUALE: No recross from me, Your Honor.

19 THE COURT: Any recross?

20 (Pause)

21 THE COURT: You're excused, Dr. Fleming. I'm sorry.
22 Dr. Peterson. I'm sorry.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: Dr. Peterson.

25 MR. BERNICK: Farewell.

1 THE COURT: All right. Mr. Bernick.

2 MR. BERNICK: I have a housekeeping matter and then I
3 guess we should probably take up where to go from here. We do
4 want to tender to the Court an amended demonstrative 507-5
5 relating to Mr. Shelnitz's testimony. We've now changed the
6 label on slide -- well, it is 507-5 so it now is called -- now
7 is renamed Fresenius National Medical Care Holdings, Inc. and
8 it's 507A and we would offer that into evidence as a
9 demonstrative illustrating the testimony of Mr. Shelnitz.

10 THE COURT: It's denominated as 507-5A and it is
11 accepted as a demonstrative.

12 MR. PRATT: No objection, Your Honor.

13 MR. BERNICK: And with that, I think we're probably
14 -- I know that Mr. Lewis is approaching with his never-ending
15 quest to get some more -- oh, not those. We're not agreeable
16 to those. I think probably we could start another witness
17 which would begin really -- I guess the question is, is there
18 any other witness who is going to be called. We've taken Dr.
19 Peterson as our last witness.

20 MR. LOCKWOOD: Your Honor, we had requested time to
21 argue the motion in limine on Professor Shein who is going to
22 be flying in tomorrow morning and who --

23 THE COURT: Yes. We need to do that.

24 MR. BERNICK: Yes, and I want to get to that but I
25 want to get -- I'm now kind of reorganizing myself procedurally

1 to where we are in the case, I think with -- Peter, if you
2 could -- I think that with the testimony of Dr. Peterson,
3 subject to some documents that we may want to offer, that the
4 Plan Proponents -- the Plan Proponents are resting this segment
5 of the trial phase?

6 MR. LOCKWOOD: Yes.

7 MR. GUY: Yes.

8 MR. RICH: Yes.

9 MR. BERNICK: Mr. Rich, that's good enough. So, I
10 think then the question is whether we start the objector's
11 insurance segment, and I'm not sure what that comprises, or
12 whether we take up some preliminary matters at this point,
13 including a priority matter regarding Mr. Shein.

14 MR. LOCKWOOD: Mr. Giannotto has that.

15 MR. BERNICK: Oh, okay.

16 THE COURT: I think we need to do the argument with
17 respect to Professor Shein because, if he is not going to be
18 called, I thought the idea was to save him a trip here if he's
19 not being called and otherwise to make sure that he gets here
20 if he is being called. Mr. Giannotto?

21 MR. GIANNOTTO: Yes, Your Honor. Michael Giannotto
22 for the CNA Companies. The insurers who retained Dr. Shein and
23 were proffering him have decided to withdraw him as a witness
24 so there's no need for argument on the motion.

25 THE COURT: Oh.

1 MR. GIANNOTTO: He will not be testifying.

2 THE COURT: All right. Thank you.

3 MR. LEWIS: Good afternoon, Your Honor. Tom Lewis
4 for the Libby claimants.

5 THE COURT: Yes, sir.

6 MR. LEWIS: We had some matters that were -- I guess
7 the best description, were held in abeyance at the end of our
8 case because we didn't have some things worked out. One of the
9 matters was we had offered during our case-in-chief, Exhibit
10 LC-27 --

11 MR. BERNICK: I'm sorry. Can I just interrupt just
12 one second?

13 MR. LEWIS: Sure. Interrupt all you want.

14 MR. BERNICK: No, no, no. I know you're here. I'd
15 like to get clarity if we're going to get into housekeeping
16 stuff, get clarity on the live testimony and, as I understand
17 it, DNSF still wants to consider whether to call somebody live
18 or wants to have that roll over till tomorrow morning, as I
19 understand it, which would be okay with us. Is there anybody
20 else who intends on the objector's side to call a live witness
21 so that we can at least get that schedule down and then take up
22 the remaining matters?

23 (Pause)

24 MR. PRATT: Warren Pratt, OneBeacon and Seaton, Your
25 Honor. We may end up having to call a live witness but I hope

1 we don't. It relates to these three exhibits, Mr. Brown's
2 letters, and let me just recap that.

3 MR. BERNICK: Before -- I'm sorry. This is exhibits
4 and I really would like --

5 MR. PRATT: Well, I know, but --

6 MR. BERNICK: I don't want to argue. Your Honor, I
7 don't want to argue.

8 THE COURT: Mr. Bernick, he needs to know whether or
9 not he has to call a witness. That was the point.

10 MR. PRATT: That's it.

11 THE COURT: Go ahead, Mr. Pratt.

12 MR. PRATT: Thank you, Judge. At the conclusion of
13 Mr. Fink's testimony yesterday -- now, I don't have the fancy
14 on-line stuff but, according to my notes, the Court directed
15 the parties to confer about trial exhibits and the nature of
16 claims asserted against OneBeacon and Seaton. And we've
17 reached an agreement. We haven't handed these up yet because
18 they're exhibits, but we've reached agreement as to, I think,
19 just about everything but not as to these three. We tried to
20 get them in through Mr. Finke. That objection was sustained.
21 We tried again with Mr. Shelnitz. Your Honor ruled that we
22 couldn't authenticate them through that witness but here's what
23 I want to say about it, Your Honor.

24 I don't believe -- first of all, I don't believe
25 there's any real dispute about authenticity. We could bring --

1 if we're forced to and we have to bring a witness out here, it
2 would take three minutes to do that but --

3 MR. BERNICK: There is no issue so that's --

4 MR. PRATT: No issue as to that.

5 MR. BERNICK: About authenticity.

6 MR. PRATT: It's the Plan Proponent's own exhibit
7 that we're using and it's offered for a very limited purpose.
8 Mr. Brown conferred with Mrs. Esayan not that long ago, just a
9 little while ago, and I would hope that we could reach an
10 agreement about that. But if we can't, and we have to bring a
11 witness out here, then we will. So, that's something that was
12 on our list but I don't know what we're going to have to do
13 about it.

14 THE COURT: Okay. So, the issue is you're going to
15 meet tonight to see if you can get an agreement about it?

16 MR. PRATT: Well, we've already conferred with
17 debtor's counsel and she, I assume, will pass that along.

18 MR. BERNICK: Very simple. Pass it along to me.
19 There's no issue that's going to be resolved by bringing
20 somebody in to authenticate the document. The document is
21 objectionable for the very reasons that we've indicated. These
22 are the letters, the self-serving -- not self -- these are the
23 letters that were sent on July 8, 2009 to counsel in order to
24 raise certain matters as to which they might have claims. And,
25 obviously, that's long after the plan was put in. I don't want

1 to re-engage in the arguments. Your Honor already has heard
2 enough of the argument and it's not something that's going to
3 turn upon the testimony of a live witness. But, if it were,
4 Mr. Brown who signed the letter could simply take the stand and
5 supply whatever is necessary. Mr. Brown is here. If they want
6 to call Mr. Brown tomorrow morning, that's fine, but it's not
7 going to resolve the objections that we've had nor is it going
8 to elucidate the objections that we had.

9 So, I don't think that there's any fact witness
10 testimony that needs to take place as to which we're going to
11 need to bring somebody in from out-of-town.

12 MR. PRATT: Your Honor, I'm a little flabbergasted by
13 Mr. Bernick's comment that this couldn't possibly be relevant
14 to anything because it's got his exhibit stickers on it. But
15 if the idea is --

16 THE COURT: Lots of things have been marked but not
17 introduced, Mr. Pratt.

18 MR. PRATT: I understand and we can argue -- we can
19 argue the legal issues. Is that what it boils down to, Mr.
20 Bernick, in your view?

21 MR. BERNICK: I think it is a legal issue. That is
22 correct. It is a legal issue to the extent if you take this
23 letter at face value -- that is, we assume there is no factual
24 issue but that the letter said what it said -- what its
25 significance is in connection with the confirmation is a

1 relevance issue and I believe that that will turn on the issues
2 that we have in confirmation which is an issue of law. That's
3 what I think.

4 MR. PRATT: Well, Your Honor, the argument that we
5 would use this for has already been made in our pretrial brief
6 so I think it's relevant. You know, maybe the Court doesn't
7 give that weight in the context of this case. I don't know.

8 THE COURT: That may be the issue. If it's relevant
9 to the question of whether or not the plan is illegal because
10 it illegally does something to whatever this claim is -- I
11 haven't read the letters, Mr. Pratt, so I can only speak in
12 pretty broad, general terms since they're not admitted either
13 -- but, so, I don't know what the content in the letter is.
14 But let me assume that the letter says that OneBeacon and
15 Seaton have a certain claim against either Fresenius or Sealed
16 Air and it's raised after the plan has been filed. The issue I
17 think you're raising is that now, because the debtor's counsel
18 have been made aware of the fact that Fresenius and Sealed Air
19 claim to have -- I'm sorry -- that OneBeacon and Seaton claim
20 to have a claim against Fresenius and Sealed Air, that those
21 claims cannot be properly channeled and/or released and/or
22 whatever the other effect is so that your client can't pursue
23 them against Fresenius and Sealed Air as a result of the plan.

24 MR. PRATT: Well, close, Your Honor, but not quite.

25 THE COURT: Okay.

1 MR. PRATT: The -- and let me just start from the
2 ground up. OneBeacon and Seaton are creditors and the reason
3 is that they have settlement agreements with the debtor. The
4 debtor agreed in those settlement agreements to indemnify
5 Seaton and OneBeacon if anybody else claimed coverage under
6 policies that fully resolved as to the debtor.

7 THE COURT: All right.

8 MR. PRATT: The exercise today with Mr. Shelnitz will
9 show that the entities that are now called Fresenius and Sealed
10 Air are parties. They signed the settlement agreement so we've
11 got direct contractual recourse on the indemnity claims against
12 those two entities.

13 In addition, and this gets a little complex but it's
14 explained in the letter, the basis for the claim. I'm not
15 asking -- not offering that for the truth --

16 THE COURT: Yes, I understand.

17 MR. PRATT: -- but just for theory. As to certain
18 environmental claims asserted by Kaneb -- you've heard of the
19 Kaneb claims -- they sought relief from the stay that was
20 preventing them from asserting those claims and that's
21 implicated as well. And, you know, those claims came up after
22 the plan was filed so, especially as to Kaneb, I don't think
23 that the timing of when this is being raised makes any
24 difference and that's to start with. But, second of all --

25 THE COURT: Well, wait. I need to interrupt because

1 there were two claims by Kaneb and I know I've ruled that one
2 has been disallowed. It was disallowed long ago in this case
3 and one wasn't filed, or at least one wasn't filed and maybe
4 that's the reason it was disallowed and I'm not sure about
5 that.

6 MR. BROWN: Well, Your Honor, may I address that --

7 THE COURT: Okay.

8 MR. BROWN: -- because I'm more familiar with that.

9 THE COURT: All right.

10 MR. BROWN: Your Honor, I think you're correct as to
11 the claims that Kaneb had directly against the debtors. There
12 had been a proof of claim filed for one and I think there had
13 been a failure to file a proof of claim for the other.

14 THE COURT: As to the other.

15 MR. BROWN: That's not what we're talking about.
16 We're talking about the other relief that Kaneb sought in its
17 lift stay motion. Kaneb had sought relief from the automatic
18 stay in order to pursue certain Grace insurers for coverage
19 and, included among those insurers were OneBeacon and Seaton.
20 And Your Honor denied the lift stay motion without prejudice.
21 The obvious implication is, at some point, they will have the
22 ability to move forward with those claims after plan
23 confirmation against the insurers; not against Grace but
24 against Grace's insurers.

25 THE COURT: Well, the implication is that as to the

1 claim that was never filed, I don't know how they're going to
2 against debtor's insurers when they can't go against the
3 debtor.

4 MR. BROWN: They have two theories, Your Honor. The
5 first of their theories is that they can go against the debtor
6 as a judgment creditor. The second of their theories is that
7 they are, in fact, a co-insured under the policies and they
8 would not be precluded from pursuing it or at least that is
9 their position, they would not be precluded from pursuing the
10 settled insurers as purported co-insureds under the policy.

11 THE COURT: All right.

12 MR. BROWN: And that gives rise -- and, Your Honor,
13 the argument is that that gives rise, and it's explained in the
14 letters, to a misrepresentation claim in connection with an
15 environmental settlement that took place in March of 1997. And
16 it's explained in the letter. It did not arise until Kaneb
17 came in and asserted claims in the bankruptcy case which was
18 long after the plan was confirmed or, excuse me, long after the
19 plan was filed.

20 THE COURT: Okay.

21 MR. PRATT: Your Honor, obviously, no one is asking
22 the Court to adjudicate that dispute and we're not offering
23 these letters for the purpose of the truth of anything that's
24 set forth in there. But the reason that we think they're
25 important is that our argument is, our belief is -- now, you

1 know, again, it turned out to be a legal conclusion today when
2 I was trying to probe Mr. Shelnitz on what does the successor
3 claims injunction cover. You know, I don't know if that's a
4 matter of law. I don't know if somebody can talk about its
5 purpose or will during the final 1129 phase of this hearing.
6 But we've already briefed the concept. Our understanding of
7 the plan is that the injunctions and releases cover these
8 claims against third party non-debtors and our argument that
9 we'd like to make, and Your Honor may or may not accept that
10 argument, but we've got a colorable good faith argument to make
11 that the injunctions and releases are overly broad and not
12 lawful. It doesn't have anything to do with the good faith of
13 the plan. It's just the scope of the injunctions and releases.

14 THE COURT: Okay.

15 MR. BERNICK: But just a short observation. Now we
16 are deep into the weeds which, I guess, is fine. Your Honor
17 wants to hear this.

18 THE COURT: No. I wanted to know whether we needed a
19 witness. That's how this started.

20 MR. BERNICK: Yeah. I don't -- I think it's quite
21 plain that we don't but, be that as it may, I mean, if they
22 want to make some kind of proffer that they believe they have a
23 claim on the basis of some kind of theory, you know, they can
24 go ahead and do that. The letter is not the appropriate
25 vehicle for doing this. It's basically a legal argument and a

1 legal assertion.

2 I think that they probably raised this in their trial
3 brief. I know that they'll raise it post-confirmation so --

4 MR. BROWN: Well, the --

5 MR. BERNICK: Excuse me. It will be laid out but as
6 to how the plan will deal with this kind of claim, that's not
7 going to be resolved by Mr. Shelnitz. That's not going to be
8 resolved by any witness that's going to be called. The person
9 they really should have asked that question about, and a lot of
10 I think what we heard asked of Mr. Finke and Mr. Hughes and Mr.
11 Shelnitz, are a bunch of plan interpretation questions that
12 could have been put to Mr. Inselbuch who did respond to those
13 issues when BNSF raised those issues. He's the one who knows
14 who is prepared to testify about the plan and they didn't ask
15 him any of those questions.

16 Be that as it may, this is an argument that does not
17 have a witness attached to it. And what I would propose in
18 order to resolve it is that, if they're interested in getting a
19 fact before the Court, which is the nature of the claim that
20 they're making, I don't have a problem with figuring out some
21 very simple way of doing that and having that be provided to
22 the Court by way of a stipulation; that is, that they believe
23 they have this claim for whatever impact it might have.

24 But to take up all this time going through lawyers'
25 letters and cross examination of witnesses or by putting some

1 other witness on the stand who is going to talk about what that
2 claim is, just strikes me as being very, very unnecessary, Your
3 Honor.

4 MR. PRATT: Can I respond, Your Honor? Mr. Bernick
5 just said a stipulation about whether they think they have a
6 claim, how that would be relevant. We're not --

7 MR. BERNICK: We don't know what the claim is.

8 MR. PRATT: Excuse me, Mr. Bernick. The issue isn't
9 whether we think we have a claim. We do but that's not the
10 issue. The pertinent fact, and we need to get this established
11 so that we can brief it; if it's not in evidence, then how are
12 we going to brief it? The pertinent fact is that a claim has
13 been asserted. A claim has been asserted against the two
14 non-debtor parties and the relevance of that, if we are correct
15 in our interpretation of the successor claims injunction which
16 is not Mr. Inselbuch's issue -- his issue is 524G. Successor
17 claims injunction is different. So, with respect to Kaneb, for
18 example, that would be a Class 9 claim, you know, if it's
19 against Grace.

20 THE COURT: All right.

21 MR. PRATT: But, you know, we can't really argue that
22 without a basis in the record to argue it and if the easiest
23 way to do this is just admit the letters which are the Plan
24 Proponent's own exhibits.

25 THE COURT: It seems to me that if you can do a

1 stipulation as to the nature of the claim, frankly, that would
2 make a lot more sense than the letters. The letters are a
3 position, apparently of your client through its attorney, to
4 another person's attorney. And does that state a position of a
5 party? It probably states a position of the party. But I'm
6 not sure how that is going to carry out the provisions of the
7 relevance.

8 The issue that you need to get to is whether or not
9 the parties agree that a claim has been asserted against
10 Fresenius and Sealed Air and I think I just heard them say that
11 they're willing to figure out a stipulation that will get that
12 information before the record.

13 MR. PRATT: Well, but, Your Honor, let me just try to
14 address that. If you say what is the document that shows that
15 a claim has been asserted against a debtor. That's a proof of
16 claim in a bankruptcy case. In effect, that's what these
17 letters are.

18 THE COURT: Oh, absolutely they're not. It's well
19 past the deadline for proofs of claim.

20 MR. PRATT: Well, but it's a letter that asserts the
21 claim. In other words, it's a --

22 THE COURT: It's a self-serving statement on behalf
23 of your client.

24 MR. PRATT: No, Your Honor.

25 THE COURT: You can't use a self-serving statement in

1 your own case. The debtor could use it in its case if there
2 were some need for that as an admission but you can't do that.

3 MR. PRATT: Well --

4 THE COURT: So, to the extent that what you're asking
5 me to do over an objection is to accept that letter as an
6 admission, I can't because you're offering it and not the
7 opposite side. So, either call a witness -- I'm done with this
8 argument. We've spent 15 minutes on it. That's enough.
9 Either call a witness or get a stipulation tonight and then
10 we'll address it tomorrow morning to see whether or not the
11 document itself comes in pursuant to the stipulation or you
12 have a stipulation of fact. Mr. Brown apparently was the
13 author. I didn't even notice that, I'm sorry, but he's here.
14 So, calling a witness shouldn't be that hard. He's here.

15 MR. PRATT: Well, Your Honor, I don't think we'd call
16 Mr. Brown.

17 THE COURT: All right.

18 MR. PRATT: We'd call an officer but let me just -- I
19 don't mean to try the Court's patience, Your Honor, but I just
20 have one more thing to say about it and I'll let it go. I view
21 these letters essentially as a legal act because whether it's
22 true or not doesn't matter. It's the fact that the claim was
23 asserted and it's asserted in the very letter that we're
24 talking about. The stipulation would just be did you assert
25 the claim. Well, we did in that letter. And, so, I don't see

1 the reason why to back off the letter but if that's the Court's
2 ruling --

3 THE COURT: I'm not making a ruling of backing off.
4 I think I said go talk to see whether you can get a stipulation
5 done. As a result of the stipulation, will the letter either
6 come in for this purpose of determining what you've just said
7 -- I'm not going to try to summarize the last 15 minutes -- or
8 will the stipulation stand on its own or do you need a witness.
9 That's what I'm trying to get to. I don't think you have an
10 answer yet from the Plan Proponents as to whether you need a
11 witness and I've spent 15 minutes trying to figure it out.

12 MR. PRATT: Well --

13 THE COURT: I can't do anything. You need to do it
14 with the debtor. If you can't get a stipulation, bring a
15 witness.

16 MR. PRATT: To circle back, Your Honor, we may have
17 one and that's where we started. We may have a witness.

18 MS. DeCHRISTOFARO: Your Honor, forgive this, but I
19 just want the record to be clear that the only witness
20 designated regarding the appropriateness of releases on the
21 order of proof submitted to Your Honor was Mr. Shelnitz, not
22 Mr. Inselbuch, just so that there isn't any implications from
23 that and I don't mean to get into -

24 MR. BERNICK: On the what? I'm sorry?

25 THE COURT: I think Mr. Inselbuch testified that he

1 was not getting into the merits of specific sections of the
2 plan in any event so --

3 MS. DeCHRISTOFARO: Yeah. I just -- and forgive me
4 but I just felt compelled.

5 MR. BERNICK: Your Honor, I think actually Mr.
6 Inselbuch did talk about the effect of the injunctions. I
7 mean, it --

8 THE COURT: He did as to certain injunctions.

9 MR. BERNICK: Yeah. Anybody who wanted to stand up
10 and ask could have asked.

11 THE COURT: They can do that with any competent
12 witness who's been designated and, if Mr. Shelnitz has been so
13 designated, he's here. They can ask him but they can't ask
14 legal conclusions. Mr. Lewis.

15 MR. LEWIS: Your Honor, I direct your attention to
16 Libby claimant's Exhibit No. 271 which has been enlarged here.
17 We offered this exhibit and the determination was that we would
18 try to work this out. We haven't. I don't know that we've
19 worked it out with Mr. Bernick but we have with Mr. Finch. Mr.
20 Finch has no objection to the exhibit. The exhibit was
21 originally produced in discovery as a Grace document and --

22 THE COURT: Can you refresh my recollection, please?
23 What is it? I can't see it on the screen so I just don't know
24 what it is.

25 MR. LEWIS: I apologize. It's called Asbestos Bodily

1 Injury Cases With a Judgment Settlement.

2 THE COURT: All right.

3 MR. LEWIS: There's been much testimony about this,
4 but there's -- we want to offer it for the purpose of showing

5 THE COURT: All right.

6 MR. LEWIS: There's been much testimony about this,
7 but there's -- we want to offer it for the purpose of showing
8 what the verdicts were, whether they were zero, \$10 or \$10
9 million. We want to complete the record on this. I don't know
10 if Mr. Bernick's going to object to this.

11 MR. BERNICK: I don't have an objection to it. What
12 I told your partner was that this was -- the reason we objected
13 to it before is, it is not an ordinary course document and
14 that's all that the witness really knew about. It was attached
15 to a discovery response and what I said to Mark is, if you just
16 show me the discovery response I'm sure we can figure out a way
17 to get the document in. I just want to make sure that it comes
18 in, in the context of how it was actually created. No
19 objection the document can come into evidence. No objection as
20 to relevance or as to the accuracy of the document.

21 MS. DeCRISTOFARO: Your Honor, could we just have an
22 identification as to what it is? It doesn't say on it.

23 THE COURT: It's the --

24 MR. LEWIS: It does say --

25 THE COURT: It's the asbestos bodily injury cases

1 that had a judgment or a -- a judgment and a settlement. It
2 was exhibit, I think he said 271.

3 MS. DeCRISTOFARO: I'm sorry. Does this come from
4 Grace's files? Because that's what I --

5 MR. LEWIS: Yes.

6 MR. BERNICK: No, it doesn't come from Grace's -- it
7 comes, as I indicated, counsel, it was an attachment to a
8 discovery response. It's not an ordinary course document. It
9 was attached to a discovery response.

10 MS. DeCRISTOFARO: Is it a Grace document?

11 MR. BERNICK: What?

12 MS. DeCRISTOFARO: It's your document though?

13 MR. BERNICK: Yes. Yes.

14 MS. DeCRISTOFARO: That's all. That's all I want to
15 know.

16 THE COURT: All right. So, it's coming into
17 evidence, Exhibit 271.

18 MR. LEWIS: Thank you, Your Honor.

19 THE COURT: But, not as an ordinary course document.
20 Something produced by Grace in discovery from its records? I'm
21 not sure what the --

22 MR. BERNICK: No, it was --

23 THE COURT: -- stipulation is.

24 MR. BERNICK: It was objections and answers -- it
25 was, I believe, an attachment to either a Grace discovery

1 response or an ACC discovery response.

2 MR. LEWIS: It was an ACC discovery response.

3 MR. BERNICK: Okay. So, this is the point is that
4 it's not a document that was generated in the ordinary course
5 of -- so, it was an ACC compilation?

6 MR. FINCH: No, no.

7 MR. BERNICK: Well, then you tell me what --

8 MR. FINCH: Nathan Finch for the ACC. Your Honor, in
9 2002 I had the good fortune to be litigating against Mr.
10 Bernick's firm on the fraudulent transfer case involving the
11 Sealed Air Corporation. The asbestos claimants committee
12 served an interrogatory upon the debtor in that case asking it
13 to list the cases that it went to verdict in -- or judgment. I
14 can't remember exactly what the interrogatory said, and Grace
15 attached this document which is Libby Claimants' 271. It's
16 also been marked with a bunch of other exhibit stickers. The
17 debtor attached that document to the interrogatory answers, so
18 it is attached as a -- the interrogatory answer authenticates
19 the document. It's a Grace document. I have no objection to
20 it coming into evidence, but it is not a document created in
21 the ordinary course of business. It's not a business record,
22 but it's a -- it is what it is.

23 MR. BERNICK: All I wanted to say, Your Honor, is
24 that we ought to have the interrogatory as to which it was
25 attached so that everybody knows when it was created. I don't

1 know if there are any limitations or --

2 THE COURT: That's fair.

3 MR. BERNICK: -- regarding the accuracy, but it just
4 ought to be would be what it is.

5 THE COURT: That's -- I think that's fair.

6 MR. LEWIS: Should I mark that 271A?

7 THE COURT: Fine.

8 MR. LEWIS: All right. It --

9 MR. BERNICK: Well, we'll mark it 271A when we get
10 the interrogatory to attach to it.

11 UNIDENTIFIED ATTORNEY: The interrogatory is here.

12 THE COURT: No, this is 271 is the exhibit, 271A is
13 the interrogatory request.

14 MR. BERNICK: No, that's not the right interrogatory.

15 THE COURT: Gentlemen, please.

16 UNIDENTIFIED ATTORNEY: Your interrogatory is here.

17 MR. BERNICK: Okay. Well, why don't you tell him
18 that.

19 MR. LEWIS: Yes, it's all here.

20 THE COURT: 271A is interrogatory, Mr. Lewis?

21 MR. LEWIS: It's discovery and discovery response and
22 it includes interrogatories. It includes requests for
23 production. The response provides this document as a list of
24 all of the Grace cases that went to verdict and their result,
25 correct? That's what it is.

1 MR. BERNICK: This is an incredible waste of time.
2 I've said before just --

3 THE COURT: Mr. Bernick, I'm tired of your saying
4 that. You will not say that again in this case.

5 MR. BERNICK: Well, Your Honor, I'm sorry. I
6 don't --

7 THE COURT: Mr. Bernick, you will not say it again in
8 this case.

9 MR. BERNICK: I will not say it again in the case.
10 Right.

11 THE COURT: Mr. Lewis?

12 MR. LEWIS: Your Honor, I hear no objection to it, so
13 I assume it can be admitted.

14 THE COURT: It -- I will admit it, but I need the
15 interrogatory that I -- that request that asks for it and the
16 response so I know what it is.

17 MR. LEWIS: All right. That's a multi-page document.

18 THE COURT: So, exhibits Libby 271 and 271A are
19 admitted, 271A only to describe what 271 is.

20 MR. BERNICK: I don't even know what 271 is at this
21 point, Your Honor, because I don't have a copy of it. I don't
22 know if it's the right interrogatory. So, I object to it until
23 I see a copy and I've got a copy with the thing attached to it.

24 THE COURT: That's fine. Gentlemen, you will once
25 again talk about this tonight and see whether or not this

1 really minor issue can't be resolved.

2 MR. LOCKWOOD: Your Honor, I would just note for the
3 record that one of the reasons they have the interrogatory is
4 the document does not speak for itself.

5 THE COURT: It doesn't. I agree.

6 MR. LOCKWOOD: It says -- it's captioned asbestos
7 bodily injury cases with a judgment settlement.

8 THE COURT: Yes, sir.

9 MR. LOCKWOOD: Those two terms are not -- I mean, I
10 don't know what a judgment settlement is. And then it has --
11 over in the resolutions it has "disposed amount" and I don't
12 know whether that's a settlement, or a judgment or a settlement
13 that occurred after a judgment or a verdict or whatever. So,
14 hopefully the interrogatory response will clarify --

15 THE COURT: All right.

16 MR. LOCKWOOD: -- so, the Court will be able to
17 understand it.

18 THE COURT: Tomorrow I will address Exhibits 271 and
19 271A. You are all ordered to confer about it tonight.

20 MR. LEWIS: Your Honor, I'm getting on a plane early
21 in the morning. Does that require me to stay?

22 THE COURT: Not if you can get something -- Mr.
23 Kovacich, will you be here?

24 MR. KOVACICH: I can handle this as --

25 COURT CLERK: Use a mic, please.

1 MR. KOVACICH: I can handle this issue tomorrow. I
2 believe --

3 THE COURT: That's not a microphone.

4 MR. KOVACICH: Your Honor, I will handle this issue
5 tomorrow. There are some other issues Mr. Lewis would like to
6 take up.

7 THE COURT: All right. Let me just make a note that
8 says I've deferred this until tomorrow, please. I need to
9 change my notes.

10 MR. LEWIS: Your Honor?

11 THE COURT: All right. Yes, sir.

12 MR. LEWIS: The next issue relates to some affidavits
13 that we were going to put into evidence. Again that was a
14 matter that was deferred. We have those affidavits here and
15 there's to be some counter --

16 THE COURT: Mr. Lewis?

17 MR. LEWIS: There was supposed to be some counter
18 affidavits or we agreed to some counter affidavits to be filed
19 by the plan proponents. And so Mr. Finch has prepared those.
20 We're prepared to stipulate those in, and by stipulation
21 already entered, we're offering these.

22 MS. DeCRISTOFARO: Your Honor, may we see those,
23 please?

24 THE COURT: Do they have exhibit numbers, Mr. Lewis?

25 MR. LEWIS: Not yet.

1 MR. GUY: Your Honor, this document isn't binding on
2 any other party, so the insurers, of course, are welcome to see
3 it, but it specifically says it's not binding on any other
4 party.

5 MR. LEWIS: There's a stipulation that's been entered
6 into and I believe it's been filed which indicates that it's
7 only binding -- their affidavits are binding on Libby. Our
8 affidavits are binding on the plan proponents.

9 THE COURT: All right.

10 MR. FINCH: That's fine, Your Honor. We will mark
11 the plan proponents' declarations as Plan Proponents' Exhibit
12 630. Do you have a document number for yours? And what I
13 suggest, Your Honor, I've got a copy of the stipulation here
14 which has incomplete versions of the two attachments. What I
15 suggest that we do is just rip off the back, hand up the
16 stipulation with the two new exhibit numbers and we can hand
17 write the --

18 THE COURT: That's fine. That's the plan proponents,
19 correct? What's Libby?

20 MR. FINCH: It's also the Libby claimants, too.

21 THE COURT: It includes everything?

22 MR. FINCH: It includes everything.

23 MR. LEWIS: 630 will?

24 MR. FINCH: No, 630 is the plan proponents. Put his
25 exhibit number on that.

1 MR. LEWIS: And our exhibit number will be 280 --
2 LC-281, Your Honor. How's that?

3 MS. DeCRISTOFARO: Your Honor, there is a
4 stipulation. I assume it's the same one that we saw before. I
5 don't have it, but the idea as I understood is, and I'd like it
6 clear on the record, that these are not being submitted as
7 against any insurer and are not used as proof of any insurer of
8 anything. And I would like if -- certainly if these to be
9 submitted with the stipulation and to be that -- that
10 submission be clear on the record.

11 MR. LEWIS: The Libby claimants so stipulate, Your
12 Honor.

13 THE COURT: And, Mr. Guy, I think you already said
14 that on behalf of the plan proponents, but could you confirm
15 it?

16 MR. GUY: Yes, Your Honor. It's in the document.

17 THE COURT: All right. So, this -- what I am getting
18 as the plan proponents is the declaration and the exhibits and
19 from Libby I'm getting the stipulation and the exhibits?

20 MR. FINCH: No, Your Honor. What we're doing is --
21 Nathan Finch for the ACC. What we're doing is, we have the
22 stipulation which has the six paragraph of agreement and it has
23 -- refers to Libby Exhibit A and ACC Exhibit B. And what I
24 have done is, write at the bottom, Libby Exhibit A is Libby
25 Claimants' 281. ACC Exhibit B is Plan Proponents' 630.

1 THE COURT: All right.

2 MR. FINCH: I have -- it's got people's John Hancocks
3 on it. Libby Claimants 281 and Plan Proponents' 630 are all
4 right here and may I hand it up to Your Honor?

5 THE COURT: Is it with the stipulation?

6 MR. FINCH: It is with the stipulation. This is the
7 only copy that exists in the world right now of this.

8 THE COURT: Okay. Does the stipulation have an
9 exhibit number because that's what I'm trying to figure out?

10 MR. FINCH: I didn't -- the stipulation does not have
11 an exhibit number, Your Honor. If you would like us to put an
12 exhibit number on it we can. I don't normally --

13 THE COURT: I think so, because -- I know, but
14 otherwise with exhibits attached to a stipulation they're
15 not -- they're going to get lost if the stipulation itself
16 isn't separately numbered.

17 MR. FINCH: Okay. Morgan, what's the next exhibit
18 number?

19 UNIDENTIFIED SPEAKER: 631.

20 MR. FINCH: Okay. Let's try this one last time. The
21 Plan Proponents' Exhibit 631, Your Honor, is the stipulation
22 which is a three-page document which is -- okay, it's a joint
23 exhibit. It's a Plan Proponents' 631, Libby Claimants' 282.

24 THE COURT: All right.

25 MR. FINCH: That's the stipulation. It's only

1 binding on the plan proponents and the Libby Claimants.

2 THE COURT: All right.

3 MR. FINCH: No one else is bound by it. It attaches
4 as Exhibit A to that stipulation, Libby Claimants' 281 which
5 are their affidavits and Exhibit B to the stipulation is Plan
6 Proponents' 630 which are the plan proponents' declarations
7 from people outside of Libby, and I'm going to, with Your
8 Honor's permission, hand it to Your Honor.

9 THE COURT: All right. I will take Exhibit -- wait.
10 Mr. Finch, why don't you give it to my clerk so she can make
11 copies for everybody so that tomorrow morning it won't be the
12 only copy in existence anymore.

13 All right. So, Plan Proponents' Exhibit 280 -- I'm
14 sorry -- 631 and 630 are admitted. And Libby Exhibits 281 and
15 282 are admitted and the stipulation is included that indicates
16 that they will not be used against any insurer. Okay. Mr.
17 Lewis?

18 MR. LEWIS: Okay. The next item is the Libby
19 Claimants have filed notice with the Court that they are --
20 will offer into evidence transcript and deposition excerpt
21 designations. There have been objections to those transcript
22 and designations filed, but I think more importantly I think
23 they're the subject of a motion in Limine that has not been
24 resolved. But, we need to offer them into evidence and --

25 UNIDENTIFIED ATTORNEY: Excuse me, Your Honor.

1 MR. LEWIS: There is one modification to our proposed
2 excerpts. We offer the deposition of -- excuse me, Your Honor
3 -- Mr. Hurlbert.

4 THE COURT: Can you spell that, please?

5 MR. LEWIS: H-u-r-l-b-e-r-t.

6 THE COURT: Okay.

7 MR. LEWIS: That is withdrawn. All other deposition
8 excerpts and prior trial testimony that's identified -- was
9 identified are being offered at this time.

10 MR. BERNICK: Your Honor, these are not proper
11 exhibits. They don't come into evidence that way. The rules
12 provide for deposition designations to be done in a certain
13 fashion and they can make those designations. They have made
14 those designations. We've objected to them and we've moved as
15 to them. They don't simply come in as a proffer. That's not
16 how the rules work.

17 So, we've objected on those grounds. We believe that
18 all of the objections and rulings made in connection with
19 deposition designations were specifically reserved for
20 consideration after this trial. That's -- those are the rules
21 that we've followed and there's no reason for an exception
22 here, particularly when Your Honor has already issued a bunch
23 of rulings relating to the whole question of individuals.

24 So, this is, again, something where we've staked out
25 the position and we believe it's completely in accordance with

1 the rules that Your Honor has followed.

2 MR. LEWIS: Your Honor?

3 THE COURT: I believe I need to hear the motion
4 that's been filed with respect to these, Mr. Lewis, and as a
5 result I think what is proper is to have this case "not closed"
6 until we have argument on these issues and then I can determine
7 whether or not these documents are admissible. So, I don't
8 think I can admit them today with the objections that are
9 pending. I have to have the argument on those objections.

10 MR. LEWIS: But, Your Honor, we want to complete the
11 record that we offered them. That's the important thing here.
12 I was -- I agree with much of what Mr. Bernick says. There are
13 objections. There are motions pending on these, but we need to
14 get these offered while in trial because we don't understand
15 that the designation of transcripts is an offer into evidence
16 unless the Court treats that matter differently.

17 THE COURT: I'm going to treat it as reserved. I
18 understand your offer, but I am not admitting them now and I'm
19 not, not admitting them now. I'm reserving ruling on that
20 issue until I can get through the arguments on those points.

21 So, at an appropriate omnibus hearing date or after,
22 I'll have, I guess Ms. Baer, work out that schedule with my law
23 clerk. We will --

24 MR. LEWIS: And then we could offer them then?

25 THE COURT: You can offer them then and then we'll

1 have the arguments and go forward. I am not closing the
2 evidence with respect to those issues because I can't until I
3 can make those rulings.

4 MR. LEWIS: That's all I was concerned about.

5 THE COURT: All right.

6 MR. LEWIS: We have one more issue, Your Honor.

7 THE COURT: What I'm going to ask, Ms. Baer, is when
8 these documents are put together either in this morass of paper
9 you're going to have to identify for me where all of this is
10 because I know I have this. I've read -- I actually have read
11 all of these things, but where, I haven't a clue. Or I'm going
12 to need the docket numbers if they're filed or something that
13 will let me pull them for purposes of that argument, or I need
14 yet again copies stuck into the binders for the argument. Work
15 something out with Ms. Baker.

16 MR. BERNICK: We'll be happy to do that. Oh, I'm
17 sorry.

18 THE COURT: All right. Okay. Mr. Lewis, go ahead.

19 MR. LEWIS: I apologize for that, Your Honor, but I
20 just wasn't familiar with the procedure of the Court on that
21 issue, so --

22 THE COURT: There wasn't a procedure, Mr. Lewis. It
23 wasn't a matter of not being familiar with it. We need to work
24 something out, except that I said that we would defer it until
25 the end, and we will.

1 MR. LEWIS: That's perfectly satisfactory with us,
2 Your Honor. We have no objection to that.

3 The next item is we -- I believe we stipulated now
4 between the conserved parties, at least the insurers and we've
5 talked to Mr. Horkovich about the fact that we want to offer
6 the primary insurance policies of Royal, Maryland Casualty and
7 CNA. I understand, but I don't mean to speak for opposing
8 counsel, I understand that there's not an objection, but there
9 is a problem.

10 Mr. Schiavoni can probably explain it better, but
11 when we talk about the Royal policies they were very old and
12 the coverage period was like 1953 to 1963 and I understand that
13 the policies, in part at least, were lost and there's been a
14 reconstruction and an agreement as to what those policies
15 purport to say. I was not privy to that agreement. I was --
16 didn't -- we didn't negotiate, but perhaps I invite Mr.
17 Schiavoni to explain it better, but we'd like to offer those
18 insurance policies into evidence.

19 THE COURT: So, you're accepting the reconstruction?

20 MR. LEWIS: Yes, Your Honor.

21 THE COURT: All right.

22 MS. DeCRISTOFARO: Your Honor, just -- Mr. Lewis, we
23 haven't heard anything about this yet, so -- on behalf of CNA,
24 so --

25 MR. LEWIS: Oh, I've talked to CNA's counsel.

1 THE COURT: Okay. Mr. Schiavoni?

2 MR. SCHIAVONI: I take what Mr. Lewis' intent is, is
3 that he's offering those policies into evidence on the
4 understanding that they'll only be -- our non-objection to that
5 will be just for this particular proceeding and that the offer
6 is that these are just the most complete pages that the debtor
7 has in its files, and that's the -- and the most complete that
8 other folks have in their files and that they're subject to
9 being supplemented and should disputes arise outside of this
10 case in another case. Is that acceptable, Mr. Lewis?

11 MR. LEWIS: Yes, Your Honor. I've agreed with all of
12 the insurers with an oar in the water on this issue that the --
13 their -- we'll stipulate that they're not to be used for any
14 other case. They're only to be offered in this case and we
15 will not try to take any advantage of them in any other case
16 that we may participate in.

17 THE COURT: Mr. Wisler?

18 MR. WISLER: Good afternoon, Your Honor. Jeff Wisler
19 on behalf of Maryland Casualty. With regard to the Maryland
20 Casualty policies that Mr. Lewis is going to submit, we did
21 agree that we would not object to their admission and, again,
22 as Mr. Lewis stated, that would only be for this confirmation
23 hearing and only for this proceeding.

24 We understand that the Maryland Casualty policies
25 that are being submitted by Mr. Lewis include only those that

1 are on Exhibit 5 to the plan exhibits that have been filed in
2 this case.

3 THE COURT: Is that correct, Mr. Lewis?

4 MR. LEWIS: Yes, they're part of Exhibit 5, Your
5 Honor.

6 THE COURT: All right.

7 MR. LEWIS: We've got them on disk. We took it from
8 the data room. It's our intention because we didn't know about
9 the reconstruction, to tell you the truth, until very recently.
10 It's our intention to put them together in paper form.

11 THE COURT: I don't need them on paper form.

12 MR. LEWIS: You don't? Okay.

13 THE COURT: No. What I need in paper form is in your
14 arguments at some point or your proposed findings, when we get
15 there, then you can quote the sections you are referring to. I
16 don't want thousands of pages of insurance policies that will
17 have no bearing on any issue.

18 MR. LEWIS: Wonderful, Your Honor. That saves us
19 some work, too.

20 MR. WISLER: Your Honor, just to be clear, with --
21 they're not actually -- no policies are attached to Exhibit 5
22 to the plan.

23 THE COURT: That's the list.

24 MR. WISLER: The policies are listed.

25 THE COURT: Yes, sir. I understand.

1 MR. WISLER: We're not stipulating to the
2 completeness of whatever Mr. Lewis has, but if he's submitting
3 those policies, we're not objecting.

4 THE COURT: Okay. That -- that's fine, but in terms
5 of the submission I'll take them on disk. But, anyone who
6 wants to make use of them in an argument or examining a
7 witness, show the witness the sections that you need them to
8 refer to or need me to refer to. Ms. DeCristofaro?

9 MS. DeCRISTOFARO: Yes, Your Honor. I just checked
10 with co-counsel. We haven't had those discussions yet. The --
11 I would -- in connection with Phase 1, because our policies
12 there are disputes over different endorsements and different
13 versions around, because we're not determining coverage here we
14 stipulated with Mr. Horkovich on behalf of the plan proponents
15 to a curtailed version that we would use for Phase 1. We were
16 planning to use the same version for Phase 2 as to which we
17 have agreement. They're not complete. They're not full, but
18 rather than fight over those kinds of issues we're using that
19 and we probably agree to the same thing.

20 But, the version that just appears on Grace's disk
21 has all kinds of problems on it and we wouldn't agree to that.
22 But, we will follow up on that issue, but I'm certainly not
23 prepared to speak to that at this moment.

24 THE COURT: Mr. Lewis? Mr. Lewis, I don't know if
25 you just heard what Ms. DeCristofaro said. She cannot agree to

1 the use of the version that's on the debtor's disks because of
2 some issues. So, she has arranged with Mr. Horkovich to have a
3 set -- subset of exhibits of the contents of the exhibits that
4 they do agree to for use in this trial, but not to the full
5 policies because they have disputes as to a variety of issues
6 about those policies. So, you need to speak with her about the
7 CNA policies --

8 MR. LEWIS: Okay.

9 THE COURT: -- and see what you can work out.

10 MR. LEWIS: I apologize. I thought Mr. Horkovich had
11 worked that out, but that's my misunderstanding. I'll
12 certainly speak with her as soon as possible and try to work
13 this out.

14 THE COURT: All right.

15 MR. LEWIS: And then I'll have my partner, Mark
16 Kovacich take this up --

17 THE COURT: -- tomorrow?

18 MR. LEWIS: -- with the Court in the morning, I
19 guess.

20 THE COURT: All right. That's fine.

21 MR. LEWIS: And that's all I have, Your Honor.

22 THE COURT: Okay.

23 MR. CARIGNAN: Your Honor, James Carignan for
24 Longacre. You may recall this morning I sought to have
25 admitted Exhibit Long 2 which I handed to your clerk dealing

1 with the -- which was the stipulation regarding classification
2 of the Morgan Stanely claims. We had Mr. Hughes on the stand.
3 He said you might need a -- or you did need a witness to
4 determine the basis of those claims to determine whether that
5 exhibit I wanted admitted was relevant. What I should have
6 pointed Your Honor's attention to is the first page of the
7 stipulation. At the time I didn't because like I said we had a
8 witness on the stand which was causing some people some
9 discomfort.

10 But, it's evident from the first page of this
11 stipulation what the basis of these, originally Bank of America
12 then Morgan Stanley claims, is and I think if Your Honor just
13 reads the first four "whereas clauses" of that stipulation
14 you'll be able to make a determination respecting relevancy
15 without a witness testifying as to the nature of those claims.

16 THE COURT: And what do they say?

17 MR. CARIGNAN: They say essentially to summarize it
18 that the Morgan Stanley claims are based on the debtor's
19 reimbursement agreements in connection with letters of credit
20 that Bank of America posted, that National Union had drawn on
21 as -- which letters of credit had been posted to secure the
22 reimbursement obligations to National Union which is, of
23 course, the basis of Longacre's claim now.

24 MR. BERNICK: That -- Your Honor, that proffer --

25 THE COURT: Yes, Mr. Bernick?

1 MR. BERNICK: Yes, that proffer does not establish
2 relevance. The question is, what's the relationship between
3 the situation with Morgan Stanley which was resolved
4 incidentally and the situation as concerns those who -- whose
5 objections have not been resolved and believe that their facts
6 are similar. In fact, their facts are very, very different.

7 So, the proffer does not establish anything to do
8 with relevance. It doesn't change any fact, doesn't elucidate
9 any fact concerning the objection that these folks are making.
10 What they're essentially saying is, well, you did it for Morgan
11 Stanley, why don't you do it for us? That's an established
12 relevance.

13 MR. CARIGNAN: Mr. Bernick admitted that both claims
14 are based on reimbursement obligations. They're both based on
15 the same settlements with the same asbestos --

16 MR. BERNICK: No --

17 MR. CARIGNAN: -- personal injury claims.

18 MR. BERNICK: No, they are very different
19 circumstances. It's not our obligation to establish the
20 relevance of this proffer. It's theirs.

21 MR. CARIGNAN: You can tell the relevance from the
22 face of the stipulation, Your Honor.

23 THE COURT: Well, the face of Longacre 1 or Long 2?

24 MR. CARIGNAN: Longacre 2, not the certification of
25 counsel, but the stipulation attached as Exhibit 1.

1 THE COURT: Okay. Mona, this is Long 1, do you have
2 Long 2?

3 MR. CARIGNAN: I have another copy, if I can --

4 THE COURT: All right. All I have here is Long 1.
5 I'm sorry.

6 MR. BERNICK: Your Honor, the fact that they're
7 omitting that they need to consider in order to establish
8 whether this is relevant or not, which it's not, is that the
9 circumstances pursuant to which the letter of credit that is
10 the basis for this claim was issued, are entirely different
11 from the circumstances in which the obligation was undertaken
12 by National Union and by Fireman's Fund.

13 MR. CARIGNAN: And the fact which he's admitting --

14 MR. BERNICK: Excuse -- excuse me.

15 MR. CARIGNAN: -- is that indirect asbestos --

16 THE COURT: Pardon me? He wasn't finished yet. Go
17 ahead.

18 MR. BERNICK: That is the critical fact that is
19 missing. The facts relating to National Union, as well as
20 Fireman's Fund, indicate that they proceeded to provide -- they
21 agreed to be sureties with respect to a specific claim, a known
22 claim, an asbestos claim and they agreed to stand in the shoes
23 of Grace as the defendant tort-feasor knowing all about those
24 things, and that makes it a very direct Nexus to the underlying
25 claim and makes that situation clearly indirect within the

1 meaning of 524(g).

2 In connection with the letter of credit that
3 underpinned the obligation as to which we resolved with Morgan
4 Stanley that belonged in Class 9 was -- had two parts to it.
5 One, it was clearly preexisting. It had nothing to -- it was
6 not undertaken. The letter of credit was not issued in
7 connection with anything to do with asbestos. It was general
8 and it was simply used by Grace in order to provide the
9 security. And the second one is at best unclear, but there's
10 no evidence that the letter of credit was issued with any
11 anticipation of its use.

12 So, there you have two obligations that are
13 undertaken that have no direct nexus, indeed no specific nexus
14 at all, to an underlying tort claim and therefore we felt that
15 they probably belonged in Class 9 and we therefore agreed to
16 that treatment. That's an entirely different set of
17 circumstances and that was what's not considered in the proffer
18 that's made. I'm sorry.

19 THE COURT: Frankly, from looking at the four
20 paragraphs, are you talking the stipulation regarding
21 classification of claims, those four paragraphs, the first four
22 "whereas clauses"?

23 MR. CARIGNAN: Well, yes. The first five "whereas
24 clauses".

25 THE COURT: That start --

1 MR. CARIGNAN: Again the issue is classification,
2 Your Honor.

3 THE COURT: That is the issue, but because the debtor
4 has agreed to classify a particular claim in that class doesn't
5 make that fact more or less relevant to the classification of
6 any other claim in that class.

7 But, this one -- there are facts that may come into
8 play that bear on that, but the stipulation itself does not do
9 that. This stipulation only says that Bank of America issued
10 three standby letters of credit that they -- those letters
11 obligated Grace Conn to reimburse the Bank of America and
12 they've stipulated now that this will be an allowed Class 9
13 claim, in essence.

14 The fifth paragraph says that pursuant to the terms
15 of the 2005 stipulation the debtors agreed that as a result of
16 the National Union Fire Insurance company, Pittsburgh, PA,
17 having drawn on two of the letters of credit that the Bank of
18 America was entitled to this Class 9 claim. That does not
19 substantiate that the liability for the letter of credit is an
20 asbestos underlying liability, nor does it substantiate that
21 the National Union claim, whatever it is, belongs in the same
22 class.

23 It does establish a nexus between the two in that the
24 letter of credit was used to satisfy the National Union claim
25 after National Union drew down on it when debtor -- the debtor

1 didn't pay whatever the obligation was. But, the stipulation
2 itself does not, I think, underlie this specific
3 classification.

4 Because you need this -- because the argument that
5 you wish to make, I think, is that there is some similarity of
6 claims, I don't think the stipulation substantiates that
7 similarity. But, I think that the fifth paragraph that shows
8 the relationship between National Union and the Bank of America
9 in that and only in that, the letter was used as a draw down by
10 National Union, that portion may be relevant to what you have
11 to say. I'm not seeing anything else that really --

12 MR. BERNICK: We don't have a problem with that --

13 THE COURT: -- affects the --

14 MR. BERNICK: We don't have a problem with that, if
15 that's what they want to get in. It was drawn down for that
16 purpose. That is not pertinent to the reason why we classified
17 it the way that we did, but we don't have any problem. It is a
18 stipulated fact. We don't have any problem with that coming
19 into evidence.

20 THE COURT: That is, I think, the fact -- a fact at
21 least that you're attempting to rely on, correct? Because the
22 rest of this document doesn't substantiate anything about
23 National Union's claim.

24 The seventh paragraph goes on to say that if National
25 Union further draws down, then certain consequences will

1 happen, but that really doesn't add anything to what Paragraph
2 5 says for this purpose.

3 MR. CARIGNAN: Well, that's a portion of what I
4 wanted in, but I also wanted on the record that the Morgan
5 Stanley claims are classified in Class 9.

6 THE COURT: That's fine. I don't think there's a
7 dispute about that.

8 MR. BERNICK: There's no issue about that.

9 THE COURT: So, yes. I accept the proposition that
10 right now Morgan Stanley is classified in Class 9 and to the
11 extent that this stipulation, particularly that paragraph has
12 some relevance, I will admit the fact and the stipulation for
13 the Paragraph 5 and if you need it I suppose Paragraph 7 which
14 also refers to National Union although at the time it was a
15 contingent claim.

16 So, all right. Exhibit Long 2 --

17 MR. BERNICK: Why doesn't counsel simply mark it up,
18 give it an A number? We'll look at it and we'll submit it
19 tomorrow morning.

20 THE COURT: All right. That's fair.

21 MR. CARIGNAN: Okay. Thank you, Your Honor.

22 THE COURT: All right. Thank you.

23 MR. BOERGER: Your Honor, Jeff Boerger for Seaton,
24 OneBeacon, Geico and Republic with a true housekeeping matter.
25 Following up on your instructions yesterday we have a hard copy

1 set of our trial exhibits which I would like to hand up. Your
2 clerk advised me that you'd like me to do that on the record.

3 THE COURT: Yes.

4 MR. BOERGER: And I would like to note for the record
5 that all of these exhibits have been provided to plan
6 proponents. The binders that I'm about to hand you are
7 substantially similar to what they have, except that we pulled
8 out any exhibits that were not admitted to this point. So,
9 they only contain exhibits that have been admitted into
10 evidence.

11 THE COURT: All right.

12 MR. BOERGER: And in the table of contents we have
13 marked with a checkmark next to the ones that are actually in
14 the binders just for ease of reference.

15 THE COURT: Okay. Thank you.

16 MR. BERNICK: Your Honor, I -- okay. So, I don't
17 know what the representations, Ms. Baer does. I just don't
18 have any idea about this, but if we've worked it out, fine. I
19 don't know what the purpose of the ceremony is now, if we can
20 verify what's going on here we'll probably be able to do it.

21 THE COURT: The purpose is that I asked that the
22 exhibits be submitted on the record, so I have --

23 MR. BERNICK: Very well. That's very well then.

24 THE COURT: -- a record of the fact that the paper
25 exhibits would be here.

1 MR. BERNICK: I guess we'll take a look at the -- all
2 of these -- these all four?

3 MR. BAER: I didn't hear the representation because
4 three people were talking.

5 THE COURT: The representation is that the -- you
6 folks would stop talking to each other and pay attention maybe
7 this wouldn't be an issue. The representation is that this is
8 a paper copy --

9 MR. BERNICK: I'm trying to find out exactly what the
10 story is, Your Honor, so I can report it accurately to the
11 Court. I'm sorry.

12 THE COURT: The representation is that this is a
13 paper copy of the set of trial exhibits that I admitted into
14 evidence, but didn't have a paper copy of for Beacon --
15 OneBeacon and Seaton. Actually, I don't think it was for Geico
16 and Republic. I believe it was for Seaton and OneBeacon.

17 MR. BOERGER: Your Honor, this is pursuant -- there
18 were certain exhibits that were admitted yesterday through
19 testimony --

20 THE COURT: GR exhibits.

21 MR. BOERGER: -- and then there were a number of them
22 that Mr. Brown informed you about the stipulation this morning.

23 THE COURT: Yes.

24 MR. BOERGER: And he went through the series of
25 exhibits and those did include a handful of Geico and Republic

1 policies --

2 THE COURT: Okay. That's fine.

3 MR. BOERGER: -- that were admitted for limited
4 reasons.

5 THE COURT: Thank you. All right. So, that is the
6 proffer. These are only a copy of the documents that have
7 already been admitted. Yes, I will take them. I don't need to
8 further admit them. They've already been admitted. Okay. Do
9 we -- have we been given a set, Mr. Boerger?

10 MR. BOERGER: The plan proponents have a set at the
11 moment just to verify that they are --

12 THE COURT: All right.

13 MR. BERNICK: Well, if that's what it is, we don't
14 need to verify it.

15 MS. BAER: Your Honor, that's -- but, I thought it's
16 two things. He said it's the first seven exhibits you admitted
17 yesterday and then it's the rest of the exhibits that are the
18 exhibits to the stipulation that we agreed to today.

19 MR. BOERGER: That's correct.

20 MS. BAER: And if that's what they are, that's fine.
21 I haven't looked at them. I haven't verified them.

22 THE COURT: Fine. Look at them. I will take them
23 tomorrow. In the event that there is no issue about them, but
24 let him know tonight, so that he doesn't need to be here
25 tomorrow for this purpose if, in fact, that is -- there is no

1 issue. All right, Mr. Boerger, I expect I will take them
2 tomorrow as the paper copies.

3 MR. BOERGER: Thank you, Your Honor.

4 THE COURT: Good evening.

5 MR. HORKOVICH: Good evening. Good evening, Your
6 Honor, Bob Horkovich. To potentially resolve a dispute
7 tomorrow, something that Mr. Lewis raised. My understanding is
8 that in Phase 1 CNA offered a certain set of insurance policies
9 to which the plan proponents stipulated. I understand that
10 same set of exhibits will be offered by CNA tomorrow, a set of
11 CNA insurance policies. But, CNA will offer a same set -- the
12 same set of exhibits offered in Phase 1 will be offered in
13 Phase 2, and similarly the plan proponents will so stipulate
14 and will not object. And they're subject to limitations, so
15 it's only to be used for the confirmation in the bankruptcy and
16 so on. The same set of conditions would apply.

17 MS. DeCRISTOFARO: We -- Your Honor, we expect that's
18 exactly what will happen.

19 THE COURT: Okay. And is this the same set that Mr.
20 Lewis is expecting to use?

21 MR. HORKOVICH: Yes, that's what Mr. Lewis is
22 referring. That's -- those are the documents to which Mr.
23 Lewis was referring.

24 THE COURT: All right. So, if they're coming in
25 through CNA, then why do I need another set from Libby?

1 MS. DeCRISTOFARO: Well, Your Honor, what I told Mr.
2 Horkovich is that we were going to go through our exhibits
3 tonight and work it out and see if we can -- the only issue
4 about the proffer by Mr. Lewis was that the version that he had
5 on the disk --

6 THE COURT: Turn your microphones off, please, folks.

7 MS. DeCRISTOFARO: That the version he had on the
8 disk wasn't the one that was arrived at, as I explained before,
9 by stipulation and so that we will likely just ask that he rely
10 on that instead of the one that's on the disk that he has.

11 MR. HORKOVICH: CNA's submission rather than the --

12 COURT CLERK: Use the microphone.

13 MR. LEWIS: Your Honor, that's perfectly
14 satisfactory. That's what I was attempting to accomplish
15 anyway. We just want to be sure that they're going to be
16 offered and I do't know, based on that, whether they're, in
17 fact, going to be offered in the form they were used in Phase
18 1. Are they going to be offered, I guess, is the question?

19 MS. DeCRISTOFARO: Yes, we expect that they will be.
20 I just -- as I told Mr. Horkovich we're going through tonight
21 to make sure that -- which of our exhibits we're offering, and
22 I expect that we will be doing that.

23 MR. LEWIS: I guess that means we still can't get
24 resolution until tomorrow and --

25 THE COURT: That's --

1 MR. LEWIS: -- that's fine, Your Honor.

2 THE COURT: All right.

3 MR. WISLER: Your Honor, Jeff Wisler, on behalf of of
4 Maryland Casualty and Zurich. First on behalf of Maryland
5 Casualty, in lieu of live testimony we have agreed with the
6 plan proponents to submit a declaration as MCC Exhibit 3,
7 Maryland Casualty Exhibit 3, and attached to that declaration
8 are Maryland Casualty Exhibits 1 and 2. They are the two
9 settlement agreements between W.R. Grace and Maryland Casualty.
10 And I don't believe there are any objections and I would like
11 to hand up a copy to Your Honor and admit Maryland Casualty 1,
12 2 and 3 into evidence.

13 THE COURT: All right. Is there any objection?

14 UNIDENTIFIED ATTORNEY: No, Your Honor.

15 THE COURT: All right. They're admitted. Thank you.

16 MR. WISLER: As to Zurich, Your Honor, in lieu of
17 testimony we have a declaration from Michael Beresh (phonetic).
18 We've labeled that exhibit, Zurich Exhibit 17A. Attached to
19 Exhibit 17A is Zurich Exhibit 17 which is an asbestos claim
20 settlement agreement between W.R. Grace and Zurich. The plan
21 proponents have agreed to allow us to submit this as our
22 evidence so I'd like to admit -- hand to Your Honor and admit
23 into evidence Zurich Exhibits 17 and 17A.

24 THE COURT: Any objection?

25 UNIDENTIFIED ATTORNEY: No, Your Honor.

1 THE COURT: Thank you. All right, 17 and 17A --
2 Zurich 17 and 17A are admitted.

3 MR. WISLER: Thank you, Your Honor. That's all I
4 have.

5 THE COURT: Okay. Thank you. Mr. Schiavoni.

6 MR. SCHIAVONI: Your Honor, Tanc Schiavoni for
7 Arrowwood. Along the same exact lines I have two declarations.
8 The -- we offered during the hearing on the Arrowwood
9 settlement, we offered testimony from three witnesses. We made
10 a proffer at that hearing if you recall. We put in a full
11 declaration from myself. That's in the record already. There
12 were no objections then.

13 Subsequently, I'm going to re-offer my own
14 declaration and I'm offering also the declaration of the
15 second witness that we offered at that prior hearing, Carl
16 Pernicone (phonetic), and we've shown this to the plan
17 proponents and to Libby. I don't believe there's any
18 objection. I was actually looking forward to testifying, but
19 no takers. But, I'm prepared to answer questions in the
20 hallway. We have a third witness --

21 THE COURT: Take them to the bar, at least, Mr.
22 Schiavoni.

23 MR. SCHIAVONI: Someone else has to buy drinks if I'm
24 going to let them question me. I've got a third witness, a Mr.
25 Hooper, that Dan Cohen -- we have a declaration for. He's

1 raised some questions about that we're going to address -- try
2 to address this evening and he asked to be here when we present
3 that, so we'll wait until tomorrow to do that.

4 THE COURT: All right.

5 MR. SCHIAVONI: Otherwise, I'm going to hand these
6 up. We've marked them as A-34, that's my declaration, and
7 A-57 as Mr. Pernicone's declaration.

8 THE COURT: A -- I'm sorry, 54?

9 MR. SCHIAVONI: A-34 is mine --

10 THE COURT: Oh, 34.

11 MR. SCHIAVONI: -- and A-57 is Mr. Pernicone's.

12 THE COURT: Any objection? All right. A-34 and A-57
13 are admitted.

14 MR. SCHIAVONI: Thank you, Your Honor.

15 THE COURT: Mr. Plevin, just give me a minute. I've
16 got too many exhibits. I can't type with all these exhibits
17 here, so I need to move some and I'll be with you in one second
18 please.

19 MR. PLEVIN: No problem, Your Honor.

20 (Pause)

21 THE COURT: Okay, Mr. Plevin. Thank you.

22 MR. PLEVIN: Your Honor, you heard earlier today that
23 we had a stipulation on a lot of exhibits. What I'd like to do
24 is, I've got two notebooks and one loose exhibit and just very
25 briefly tell you what they are. We have a stipulation that has

1 been filed. I think I mentioned this morning the docket number
2 is 23-195 and that is a stipulation of facts that not only
3 attaches documents, but also represents the agreement of
4 Fireman's Fund and the plan proponents on certain facts that
5 are not tied to documents.

6 Part of the stipulation attaches documents and those
7 are -- those have exhibit stickers, and so they are -- we've
8 labeled them FFICSC for Fireman's Fund Insurance Company Surety
9 Claim. And the exhibit numbers attached to the stipulation are
10 1 through 6, 8, and 9A through 9-O.

11 THE COURT: Wait. I'm sorry, 1 through 6, 8 and 9 --

12 MR. PLEVIN: -- A through 9-O.

13 THE COURT: All right.

14 MR. PLEVIN: And I would -- I believe 2 and 3 may
15 already have been admitted today. Those are the bond and the
16 indemnity agreement.

17 THE COURT: Yes, they were in.

18 MR. PLEVIN: So, I would offer these exhibits into
19 evidence. I also have --

20 THE COURT: Wait. Is there any objection to
21 Fireman's Fund 1 through 6, 8 and 9A through 9-O?

22 UNIDENTIFIED ATTORNEY: No, Your Honor.

23 THE COURT: All right. They're admitted.

24 MR. PLEVIN: Your Honor, I also have documents that
25 we agreed would be admitted in lieu of my client's live

1 testimony. Those are the same prefix, FFICSC-10, 14 through 22
2 and then the loose exhibit is 23.

3 THE COURT: Can I put it in the binder?

4 MR. PLEVIN: You can if you have a hole punch.

5 THE COURT: Okay. Is there any objection to
6 Fireman's Fund 10, 14 through 23?

7 UNIDENTIFIED ATTORNEY: No, Your Honor.

8 THE COURT: Thank you.

9 MR. PLEVIN: Thank you, Your Honor.

10 THE COURT: All right. One second. Mr. Shiner?

11 MR. SHINER: Good afternoon, Your Honor, Michael
12 Shiner for AXA Belgium, the successor to Royal Belge. Back in
13 Phase 1 we had offered three exhibits along with the
14 declaration of Ms. McCabe. We have the exhibits again.
15 They're the exact same exhibits. I understand there's no
16 objection to their admission and what we -- would it be easier
17 to simply move in the existing declaration from Phase 1?

18 THE COURT: If you can give me the exhibit number,
19 maybe. I'm not sure. Frankly, I haven't figured out how I'm
20 going to take track of all of this yet, Mr. Shiner. So, maybe
21 it would be better to get a second copy so I have a binder
22 that's related to Phase 2.

23 MR. SHINER: I'll bring you a brand new copy with a
24 binder -- in a binder tomorrow --

25 THE COURT: All right.

1 MR. SHINER: -- related to Phase 2.

2 THE COURT: And what are the exhibit numbers?

3 MR. SHINER: AXA-1, AXA-2 and AXA-3. And, Your
4 Honor, we had also joined in certain exhibits that were offered
5 by other insurers. Instead of coming up every time that
6 happens we simply -- to the extent they're moved in, we join in
7 their moving the exhibits.

8 THE COURT: Well, once evidence is in, unless it's
9 for a limited purpose, it's in for everybody, so you don't need
10 to join in the submission of exhibits and you can use them in
11 the closing argument or the briefs, whatever you need.

12 MR. SHINER: Thank you, Your Honor.

13 THE COURT: All right. Is there any objection to AXA
14 Belgium 1, 2 and 3 being admitted in Phase 2?

15 UNIDENTIFIED ATTORNEY: No, Your Honor.

16 THE COURT: All right. They're admitted and I'll get
17 copies tomorrow. Good evening.

18 MR. WORF: Good evening, Your Honor, Richard Worf for
19 Garlock Sealing Technologies.

20 THE COURT: Yes, sir.

21 MR. WORF: We have entered into a stipulation in lieu
22 of live testimony with the plan proponents. It's at Docket
23 Number 23219. Attached to the stipulation is a list of certain
24 exhibits -- Garlock's exhibit list that Garlock is offering.
25 For the purposes that Garlock is offering them for, I believe

1 the only objections remaining are relevance objections which
2 we're not going to argue at this time I understand. So, with
3 that I believe we will just move those into evidence subject to
4 the relevance objections that are going to be argued at a later
5 time.

6 THE COURT: All right. Is that acceptable that I
7 will take them, but subject to a relevance ruling?

8 MR. GUY: Yes, Your Honor. It's set forth an
9 exquisite and sometimes excruciating detail in the stipulation.
10 I don't believe these are offered for the use in any live
11 testimony, so they will not be offering copies at this time,
12 but --

13 MR. WORF: Your Honor, attached to the stipulation
14 there's also a declaration that the proponents have agreed to
15 let Garlock offer in lieu of having a live witness and they've
16 agreed not to object on hearsay grounds and to waive all
17 objections except relevance. It's also attached to the
18 stipulation and Garlock moves that into evidence, as well.

19 THE COURT: All right. Are you giving me a binder
20 with respect to these?

21 MR. WORF: Yes, I have the stipulation here and I
22 also have --

23 THE COURT: All right.

24 MR. WORF: -- a disk with everything that Garlock is
25 going to offer on it.

1 THE COURT: All right. And do you have an exhibit
2 number on these?

3 MR. WORF: The numbers are attached to the
4 stipulation and we can mark the stipulation as Garlock Exhibit
5 104.

6 THE COURT: All right.

7 MR. WORF: We're also going to have a limited number
8 of other exhibits that are not coming in through live testimony
9 and that are not referenced in the stipulation. We're going to
10 attempt to authenticate those by declaration and we're going to
11 discuss that with the plan proponents and offer those at a
12 later time.

13 THE COURT: Okay. Garlock Exhibit 104, it is offered
14 and admitted, but subject to a relevance ruling after
15 appropriate argument.

16 MR. WORF: Thank you, Your Honor. Mr. Cohn?

17 MR. COHN: Yes, Jacob Cohn for Federal Insurance
18 Company. I just wanted to say that in reliance upon the
19 anticipated finalization of the neutrality stipulation, Federal
20 which only has an interest here now as a non-settled high level
21 carrier has avoided litigating anything here and we don't
22 intend to offer any additional exhibits. Frankly, I think the
23 only issue that's going to be ours is the one that we're denied
24 the neutrality on which is the assignment issue which I don't
25 think is going to require any evidentiary submission.

1 But, we had a few things like our policies and some
2 discovery that was admitted in Phase 1, am I to understand that
3 to the extent it becomes necessary you want extra copies of
4 those in a binder for Phase 2?

5 THE COURT: Either that or I need a designation
6 somewhere as to where they are in Phase 1.

7 MR. COHN: That's fair enough. Thank you, Your
8 Honor.

9 THE COURT: So, you're going to give me that
10 tomorrow, Mr. Cohn?

11 MR. COHN: Sure.

12 THE COURT: All right. One second. Mr. Demmy?

13 MR. DEMMY: Yes, Your Honor, John Demmy for Fireman's
14 Fund and all the FD Allianz insurers. We had provided exhibits
15 -- the same set of exhibits actually that we provided in Phase
16 1 and largely I think 32 out of the 35 of them drew no
17 objection whatsoever. I'm bringing out a couple of
18 housekeeping issues and trying to answer a question for Mr.
19 Horkovich. I just wanted to note that we'll be offering those
20 exhibits tomorrow before this part of the Phase 2 proceeding
21 ends. I just didn't want to let that go unmentioned, rather,
22 before the phase ended.

23 THE COURT: Okay.

24 MR. DEMMY: So, I'll do that tomorrow.

25 THE COURT: All right. That's fine and I -- if they

1 were really voluminous, as long as you can tell me where they
2 are in Phase 1 -- this is true for your client, too, Mr. Shiner
3 -- I'm happy to have the exhibits back in Phase 1. I thought
4 it was just going to be Mr. Shiner's, but if it's all the
5 insurers doing the same thing, I don't need duplicate sets of
6 voluminous records.

7 MR. DEMMY: That's the question that Mr. Horkovich
8 asked that we're finding out and we'll provide to the Court and
9 to the parties.

10 THE COURT: All right.

11 MS. BAER: Your Honor, I hate to walk up here with a
12 large binder, but I'll replace it with something else. Your
13 Honor, the eagle eyes of Alan Rich last night discovered for us
14 that the Plan documents that were admitted as exhibits and put
15 on your CD were actually the wrong versions. They were the
16 ones filed on February 27th and as you may recall at the March
17 9th hearing when you approved them there were some minor
18 adjustments made before publication went out.

19 We, Your Honor, last night when we made the discovery
20 took the CD that went out to everybody for publication, printed
21 the plan documents again in hard copy so we know that they're
22 the right versions. We then put those plan documents on a new
23 CD, Your Honor, so you'd have them on CD as well as hard copy,
24 and we also added on the September 4th, 2009 modifications to
25 the plan that were filed on September 4th, 2009.

1 So, Your Honor, I'd like to give you this binder and
2 the replacement CD. I have a number of replacement CDs if
3 other parties want them, but we've already put them onto our
4 FTP website and they can get them that way. And, again, if
5 they want hard copy CDs, we can provide those, too. And, Your
6 Honor, if you'd like, I can tell you where in your agenda
7 binders are the ones that were given to you that are incorrect
8 and we can grab those.

9 THE COURT: I think you can just do it. It will make
10 it easier --

11 MS. BAER: Well --

12 THE COURT: -- rather then, yes, straighten them out
13 in the agenda binders yourself, so that I have the correct set.
14 I definitely want the correct set. I take it nobody has an
15 objection to my having the correct plan.

16 MS. BAER: And I will hand that to Your Honor.

17 THE COURT: All right. All right. So, Ms. Baer,
18 you'll just have somebody go through.

19 MS. BAER: Right.

20 THE COURT: It will be in this front row set.

21 MS. BAER: Yes. Well, I'll stand and work with that
22 right away. And then, Your Honor, one final matter is, we're
23 trying to, you know, limit the number of additional bodies we
24 need to bring in and we had designated a Canadian lawyer to
25 come in to essentially put into the record two vital pieces of

1 information that are confirmation requirements.

2 One is that we have the Canadian ZAI settlement
3 approving Canada. And you, in fact, have a copy of that order
4 in some other pleading, but we have a certified verified copy
5 from Canada. And number two that Canadian rep counsel was
6 appointed in Canada to represent all of the Canadian ZAI
7 claimants and to vote the plan.

8 We have an affidavit from him that I will circulate
9 by e-mail tonight. I have a hard copy here, but it's the copy.
10 I don't have the fancy one certified. It will be here tomorrow
11 by Federal Express. The question is whether or not we need to
12 bring him live to put these documents into evidence, or if the
13 parties will accept his affidavit. Nobody objected with
14 respect to anything Canadian. There were no objection from any
15 party related to any of the Canadian provisions of the plan and
16 the like.

17 So, Your Honor, again, I'll circulate a hard copy to
18 everybody. We'd appreciate knowing as soon as possible whether
19 we need to fly somebody in from Toronto to testify.

20 THE COURT: Is any -- well, they haven't seen the
21 stipulation. Does anybody see a need at this point for a
22 witness to testify as to those facts?

23 (No audible response)

24 THE COURT: I don't think you're going to need a
25 witness for that purpose, but circulate the affidavit tonight

1 and we'll see what the parties say in the morning.

2 MS. BAER: Thank you, Your Honor.

3 THE COURT: So, you'll produce those exhibits
4 tomorrow, correct, to the Court?

5 MS. BAER: Yes, Your Honor. I have copies now, but
6 I'll bring the original certified copies in.

7 THE COURT: All right.

8 MR. BERNICK: Can we inquire as to whether there are
9 any intended live witnesses and I know that, again, BNSF wants
10 the evening to think that over, but is there anybody else that
11 want -- that believes they want to call a live witness, and
12 that's -- the gentleman, Mr. Pratt, anybody else?

13 THE COURT: I don't think Mr. Pratt wants to. I
14 think the issue is whether Mr. Pratt has to, but okay.

15 (Laughter)

16 MR. BERNICK: Okay. Well, yes. So, in that event it
17 sounds like we're probably going to get to the lender's case
18 tomorrow and our expected order of proof would be Mr. Tarola.
19 Mr. Tarola has a very tight schedule tomorrow, so it would
20 actually -- well, I guess we'll go with the proper order and
21 simply take the testimony from BNSF and from whomever, if
22 that's going to be offered. Then we'll call Mr. Tarola. Then
23 we'll call Mr. Shelnitz to talk about the lender situation.
24 Then we'll call Ms. Zilly to testify as an expert, and at that
25 point our case with respect to the lenders will close.

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1      We then expect that it will -- then there -- I think
2 there will be some --
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3 THE COURT: Let me remind everyone, tomorrow is the
4 day that this case stops at noon.

5 MR. LOCKWOOD: I thought that was Thursday.

6 THE COURT: The 17th, yes.

7 MR. LOCKWOOD: Tomorrow's the 16th, Your Honor.

8 THE COURT: Oh, okay. It's been so much fun, I'm
9 sorry.

10 (Laughter)

11 THE COURT: I apologize. I lost a day.

12 MR. BERNICK: So, at that point --

13 MR. LOCKWOOD: I think we've lost two weeks, but
14 that's different.

15 MR. BERNICK: We may call Denise Martin, as well, as
16 part of our case, but then it will be up to the lenders to call
17 their witnesses and I think that there might be a short
18 rebuttal by Ms. Zilly, depending upon that case. But, then
19 that is our expected order of witnesses for tomorrow.

20 I don't expect that that's actually going to take all
21 day. And beyond that I'm not sure to what extent we will--
22 well, we'll then go into the next phase of the case. I know
23 that we're going to be calling Mr. Ostern and Judge Sanders as
24 part of that case. I don't -- we may get to them tomorrow. I
25 just don't know.

1 MR SCHIAVONI: Your Honor, I came here largely for
2 the BNSF witnesses and I would just ask that tomorrow's the one
3 and only day because of a very unique situation, I can't be
4 here until ten o'clock. I asked Mr. Bernick as almost a
5 personal favor if BNSF calls a witness if he'd allow them to
6 call it after ten o'clock and he'd have somebody in the slot
7 before them.

8 MR. BERNICK: That's not -- that's fine. Mr. Tarola
9 will be grateful for being able to get out all the earlier.

10 THE COURT: All right. Is there anyone who has an
11 objection to starting with Mr. Tarola and deferring the rest of
12 the insurer's cases until after Mr. Tarola's testimony?

13 No one's objecting. We'll start with him tomorrow,
14 so that his schedule can be accommodated and then we'll finish
15 with the insurer/other cases.

16 The lenders, Mr. Pasquale, I don't know whether you
17 know are the lenders going to put on any witnesses?

18 MR. PASQUALE: Yes, Your Honor. We will have two
19 witnesses, Mr. Kruger and an expert witness, Mr. Frezza. And
20 that's for the committee and the lenders.

21 THE COURT: And how long do you expect they're going
22 to take? I'm just trying to see whether we're going to get to
23 Mr. Austern and Mr. Sanders on Friday or whether, in fact,
24 we're going to be taking up Thursday and Friday with the
25 remainder of the debtor's case and the lender's case.

1 MR. PASQUALE: The Court had Friday, but that's fine.
2 No, Mr. Kruger will be --

3 THE COURT: Oh, I don't have Friday. Oh, Thursday.
4 I'm sorry.

5 MR. PASQUALE: I didn't think so.

6 THE COURT: I keep thinking today's Wednesday. I
7 apologize. I meant Thursday morning.

8 MR. PASQUALE: I think Mr. Kruger will be very short.
9 Mr. Frezza a little bit longer, maybe an hour and a half all in
10 including cross on --

11 THE COURT: All right. So, it's possible Thursday we
12 may actually start another phase of the case.

13 MR. BERNICK: Yes, I -- I'm not -- that's tomorrow,
14 Wednesday, I think it's possible that we will be starting
15 another phase. That's to say Mr. Shelnitz on direct
16 examination will be about a half hour. Mr. Tarola shorter.
17 Ms. Zilly probably 45 minutes, and Ms. Martin probably about a
18 half an hour.

19 THE COURT: Oh, all right.

20 MR. BERNICK: So, I think that there's some chance,
21 but we'll definitely start the next phase of the case on
22 Thursday. I mean, I think we may start it tomorrow and we'll
23 clearly be in it on Thursday.

24 THE COURT: Okay. And then when is the next time
25 that this case is reserved for trial?

1 MR. LOCKWOOD: October 13 and 14, Your Honor.

2 THE COURT: Okay. Is it going to finish then?

3 MR. BERNICK: I think it may finish -- it may finish
4 -- it may finish this week. I don't know. It depends on how
5 many witnesses the other folks are going to call, but we don't
6 have that many witnesses for the last phase. We have Mr.
7 Austern and Judge Sanders and we have Ms. Zilly to talk about
8 best interests.

9 THE COURT: Okay. My own housekeeping matter then.
10 I know that the -- some of the parties apparently were trying
11 to work out some order that would govern the post-confirmation
12 trial process. Has that been finalized?

13 MR. BERNICK: I think we've submitted that as a
14 proposed order, have we not? We've submitted it. It's not
15 agreed to.

16 THE COURT: Okay. Then some time, either Friday if
17 we get to it or if not then in October, I suppose -- I'm sorry.

18 UNIDENTIFIED ATTORNEY: Thursday.

19 THE COURT: Oh. I'm sorry. Thursday we will attempt
20 to address that issue and if we don't get to it then I don't
21 know if it's something that we can put onto the omnibus
22 hearing, so that perhaps we can get that issue looked at before
23 the trial phase is over, if witnesses have to continue in
24 October.

25 MR. BERNICK: Well, the -- I'm sorry. The -- our

1 proposal under the -- on what we've submitted is that we would
2 have the first briefs actually due on the 25th which is before
3 the next omnibus because we would like very much to continue
4 towards the process of getting the plan confirmed. So, if we
5 can't take it up -- although I don't know why we couldn't be
6 able to take it up at some point before Thursday midday. I
7 think it's not that difficult to resolve.

8 The real issue is the order of briefing and the
9 timing for briefing. That may take a little time, but I don't
10 think it's outside the realm of possibility to complete that.
11 That would enable us to at least be working on a schedule to
12 complete the post trial briefing.

13 THE COURT: Okay. Well, I suppose it may depend on
14 whether you're finished. You're talking about submitting the
15 initial briefs a week after the trial starts, essentially?

16 MR. BERNICK: This -- the original proposal that we
17 made, and it remains our proposal, is that we have a series of
18 briefs that follow the sequencing of the trial. So, the first
19 brief that would be due on September 25 is obviously not a
20 brief that relates to the matters that we're still litigating.
21 It relates to Libby and the discrimination issue which was the
22 substance of what was presented last week.

23 THE COURT: Okay. Am I going to be able to address
24 those issues until we have the arguments on the exhibits that
25 Libby wants to admit that I have to determine relevance and the

1 other things on?

2 MR. BERNICK: Well, I think that that all deals with
3 the -- our proposal, I think, is going to be that -- the hour
4 is very, very late, Your Honor. If you want to -- this is a
5 whole new area. If the proposal that we were going to make is
6 that insofar as Your Honor has reserved on exhibits for
7 relevance and reserved on designations for relevance, there's
8 no way it's going to be humanly possible to actually have
9 arguments, document-by-document, designation-by-designation.
10 We just don't think that's feasible and we don't think it's
11 necessary.

12 So, what our proposal would be is that people submit
13 their post trial briefs and in those post trial briefs make
14 reference to whatever documents they have tendered, but as to
15 which relevance has been reserved. And the same thing with
16 respect to the designations. And in the course of the post
17 trial briefs if people want to raise issues regarding the --
18 want to actually address admissibility issues, Your Honor then
19 can see those issues framed in the context of a brief that
20 explains the relevance of the material. I think it's much,
21 much more efficient than having document-by-document argument
22 where frankly Your Honor is still not going to be completely
23 advanced in terms of knowing what the parties' contentions are
24 regarding relevance.

25 So, if we work the admissibility issues, particularly

1 relevance, into the post trial briefing then at that point when
2 we have argument after the post trial briefs are in and Your
3 Honor wants to entertain argument regarding admissibility, we
4 can do that. Otherwise, I think we're going to have a very,
5 very long proceeding, which currently is not even scheduled, to
6 deal with deposition designations and with documents.

7 THE COURT: Okay.

8 MR. BERNICK: So, our proposal basically works along
9 those lines.

10 THE COURT: All right. Well, I don't want to get
11 into this issue tonight because it is pretty late and I've set
12 you about some other tasks that I think you need time to work
13 on tonight. But, I think that to a certain extent that at
14 least has some facial appeal because to the extent that I can
15 understand your arguments in the context of all of the evidence
16 that you point out to me, that would be helpful.

17 But, I am not going to be accepting briefs and post
18 trial designations that do not refer specifically to the
19 exhibits in the testimony. I'm not going to do that. I want
20 the references to the exhibits in the testimony. If it's been
21 -- if I've reserved, you can tell me that in the post trial
22 submissions and I'll reserve and make a ruling as it's
23 necessary, but this is too much material to try to put together
24 without the references to the specific exhibits. So, if
25 somebody's going to cite an exhibit, I want it cited.

1 MR. BERNICK: Well, that was the rule that Your Honor
2 laid out before --

3 THE COURT: Yes.

4 MR. BERNICK: -- and I believe that we have
5 incorporated -- or at least I hope we've incorporated it into
6 our proposal. And we further undertook to the extent possible
7 to provide the linkage so that you can actually click on the
8 images.

9 THE COURT: Yes, that's great.

10 MR. BERNICK: Yes, I --

11 THE COURT: It worked fine even though it's
12 apparently not the right plan, but it worked fine.

13 MR. BERNICK: The --

14 MS. DeCRISTOFARO: Your Honor?

15 MR. BERNICK: The exhibits -- it would be -- it would
16 have to be a matter of record, so the exhibit would have to
17 have been proffered as to the deposition designations because
18 you don't proffer deposition designations, you make the
19 designations, the designation process is the proffer. The
20 deposition designations would also be fair game in the trial
21 briefs and -- but that is a discrete set of material that I
22 believe already has been furnished to the Court in the fashion
23 that we indicated which is transcripts that have been marked up
24 with the designations and the objections.

25 So, it would be just the record comprised of what's

1 happened here, live and through exhibits and then the
2 designations.

3 THE COURT: Okay.

4 MS. DeCRISTOFARO: Your Honor, I was just going to
5 say I'm sure you don't want to hear the merits, but that order
6 was submitted with a statement that every objector has felt
7 that there's inadequate time allowed for the post trial
8 briefing and I just want you to be aware that everyone agreed
9 -- everyone disputed the proposed order, and I just want you to
10 know that.

11 THE COURT: Okay. I haven't looked at it. I know
12 that it's been submitted. I have not seen it. I think that in
13 concept the proposal of addressing exhibits and testimony in
14 the context of the briefs makes sense. The timing, you know,
15 that's a whole different issue. You're going to get adequate
16 time to do what you need to do, but it's not going to be months
17 and months.

18 You've already submitted pretrial briefs that cover
19 most of what you're going to tell me post trial, so I don't
20 need to have reargued what you've reargued. What I need is for
21 you to true up the evidence to the contentions that you've
22 made. That's what I need.

23 MS. DeCRISTOFARO: Your Honor, September 25th is
24 around the corner to start this.

25 THE COURT: Well, I understand that. Okay. Mr.

1 Kovacich?

2 MR. KOVACICH: Your Honor, I was going to make a
3 similar point, just that we don't agree with the idea that the
4 briefing for each of the phases which were designated by the
5 plan proponents start at the conclusion of those phases. For
6 the record, I want that to be clear. We -- everybody
7 representing Libby in this case has been here throughout the
8 whole trial. Mr. Lewis is leaving in the morning. The time
9 for briefing would have started last Friday on their proposal
10 and we obviously haven't been working on that.

11 THE COURT: That's fine. This is going to be a
12 monumental task for my staff. I am losing an experienced clerk
13 and getting an inexperienced clerk. So, I can tell you that it
14 is going to take awhile to get somebody through all of this
15 evidence and it's not going to be something that's done in a
16 rush.

17 So, I will do my best to get somebody to go through
18 it, but that's what's happening and it's going to be awhile.
19 And it's the nature of the beast as you all know if you've
20 worked with young associates and clerks before. So, it will
21 take some time to get through this. I'm not going to, you
22 know, have a rush to judgment over the issues. I've never had
23 a case at plan confirmation that has so many unresolved issues,
24 so it's going to take me awhile to get through them.

25 Hopefully, while I've ordered you folks to go out and

1 talk, you're also trying to resolve some of these plan issues
2 because as I've heard the evidence coming in, some of these
3 things are not rocket science and they could be resolved
4 without changing the essential provisions of this plan and
5 trust structure. They could be. I think you should talk.

6 Anything else before tomorrow morning? We're
7 adjourned until nine o'clock.

8 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

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C E R T I F I C A T I O N

We, KELLI PHILBURN, PAT REPKO, KATHLEEN BETZ, ELAINE HOWELL, LORI AULETTA, CEIL ASHBOCK and AMY L. RENTNER, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our abilities.

/s/ Kelli Philburn

KELLI PHILBURN

/s/ Pat Repko

PAT REPKO

/s/ Kathleen Betz

KATHLEEN BETZ

/s/ Elaine Howell

ELAINE HOWELL

/s/ Ceil Ashbock

CEIL ASHBOCK

/s/ Amy L. Rentner

AMY L. RENTNER

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DATE: September 23, 2009

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